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Nos. 55, 76

# In the Supreme Court of the United States

OCTOBER TERM, 1946

BETHLEHEM STEEL COMPANY, ET AL., APPELLANTS

*v.*

NEW YORK STATE LABOR RELATIONS BOARD

*ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK*

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT

*v.*

WILLIAM J. KELLEY, ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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No. 55

BETHLEHEM STEEL COMPANY, ET AL., APPELLANTS

*v.*

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*ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK*

No. 76

THE ALLEGHENY LUDLUM STEEL CORPORATION, APPELLANT

*v.*

WILLIAM J. KELLEY, ET AL., CONSTITUTING THE STATE LABOR RELATIONS BOARD OF THE STATE OF NEW YORK

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### OPINIONS BELOW

In the *Bethlehem* case, the memorandum opinion of Mr. Justice Batt of the Supreme Court of

the State of New York for the County of Erie (No. 55, R. 58) is unreported. The Appellate Division of the Supreme Court of the State of New York for the Fourth Department and the Court of Appeals of the State of New York both affirmed without opinion (No. 55, R. 60–61; 61–64). 269 App. Div. 805, 295 N. Y. 601. In the *Allegheny* case, the opinion of Mr. Justice Hinkley of the Supreme Court of the State of New York for the County of Chautauqua (No. 76, R. 59–63) is reported in 184 Misc. 47. The Appellate Division of the Supreme Court of the State of New York for the Fourth Department and the Court of Appeals of the State of New York both affirmed without opinion (No. 76, R. 65–66; 67–68). 269 App. Div. 805, 295 N. Y. 607.

The Decision and Direction of Election of the New York State Labor Relations Board in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WE–373, Decision No. 2751, involved in the *Allegheny* case (No. 76, R. 20–38), is reported in 7 N. Y. S. L. R. B. 103. The subsequent Decision and Order of the State Board in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WU–404, Decision No. 3519, issued on May 29, 1946, is not yet officially reported.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code.

## QUESTION PRESENTED

This brief is filed in response to the request of this Court to the Solicitor General.[1] It is limited to discussion of the following question:

Whether, when the National Labor Relations Act as interpreted by the National Board governs the obligation of employers subject to its jurisdiction to bargain with the representatives of supervisory employees, a State may attempt to regulate the same obligation of an employer predominantly engaged in interstate commerce when the State's policy is (a) inconsistent, and (b) consistent with that of the National Board.

## STATUTES INVOLVED

The statutes involved are the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by New York Laws of 1942, Chapter 518, 30 McKinney's Consolidated

[1] The position taken by the Government in this brief reflects the views of the National Labor Relations Board. However, Chairman Paul M. Herzog of the National Labor Relations Board, having formerly been Chairman of the New York State Labor Relations Board, has refrained from participating in the consideration or formulation of the views of the National Labor Relations Board in these cases.

Laws of New York §§ 700–715), herein sometimes called the State Act, and the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), herein sometimes called the National Act. The pertinent provisions of each statute are attached as Appendices A and B to this brief, *infra*, pp. 78–90.

## STATEMENT

The critical facts which give rise to the question here presented may be summarized briefly as follows:

Throughout its history the National Labor Relations Board has consistently held that supervisory employees (unlike agricultural laborers, who are expressly excluded), are "employees" within the meaning of Section 2 (3) of the National Act, and that delineation of the collective bargaining rights of supervisory employees is committed by Congress to the Board (No. 76, R. 58).[2]

Prior to May 1943, the National Board also held that units of supervisory employees were appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Act,[3] and certified representatives selected by employees in such units.[4] In *Matter of*

[2] Cases cited notes 8, 9, pp. 25–28, *infra*.

[3] *Matter of Union Collieries Coal Company*, 41 N. L. R. B. 961.

[4] *Matter of Godchaux Sugars, Inc.*, 44 N. L. R. B. 874.

*Maryland Drydock Company*, 49 N. L. R. B. 733, decided May 11, 1943, the Board reconsidered the question of the appropriateness of units of supervisory employees and, with Chairman Millis dissenting, concluded that (p. 740):

> the benefits which supervisory employees might achieve through being certified as collective bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees.

It was the opinion of the majority of the Board that (p. 741):

> in the present stage of industrial administration and employee self-organization [in mass-production industry], the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act.

Between the date of this Decision, and March 26, 1945, when it was overruled in *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, the Board dismissed all petitions filed with it on behalf of units of supervisory employees in mass production industries, on the ground that certification of representatives for such units would obstruct

rather than further effectuation of the policies of the National Act.[5]

During this period, the New York State Labor Relations Board, administering provisions of the State Act largely identical with those involved in the National Board's construction of the National Act, followed the contrary policy. Thus, the State Board consistently found that units of supervisory employees were appropriate for purposes of collective bargaining; it certified representatives selected by such units; and it ordered employers to bargain collectively with the certified representatives (No. 76, R. 35). The instant cases arise out of attempts by the State Board to apply its policies to supervisory employees of employers who are predominantly engaged in interstate commerce and clearly subject to the National Act.

On December 30, 1943, subsequent to the *Maryland Drydock* decision, the Foreman's Association of America, Chapter No. 58, filed a petition with the State Board requesting the State Board to investigate a question concerning the representation of supervisory employees employed by the Allegheny Ludlum Steel Corporation at its Dunkirk, New York, plant, and to certify the Association as exclusive bargaining representative of a unit composed of those supervisory

[5] *Matter of Boeing Aircraft Company*, 51 N. L. R. B. 67; *Matter of Murray Corporation of America*, 51 N. L. R. B. 94; *Matter of General Motors Corporation*, 51 N. L. R. B. 457.

employees (No. 76, R. 9, 15). On October 20, 1944, the Foreman's Association of America, Chapter No. 50, filed a similar petition with the State Board involving supervisory employees employed by the Bethlehem Steel Company at its Lackawanna, New York, plant (No. 55, R. 20–21, 44–45).

Prior to the filing of these petitions with the State Board, petitions for investigation of representatives selected by non-supervisory employees at both of these plants had been filed with the National Board. In the course of investigation of those petitions, the National Board had found that Allegheny Ludlum Steel Corporation, at its Dunkirk, New York, plant, and Bethlehem Steel Company, at its Lackawanna, New York, plant, were engaged in commerce within the meaning of the National Act, and were subject to the National Act (No. 55, R. 50–52; No. 76, R. 11, 16, 29). The National Board had investigated the questions concerning representation presented by these petitions and had certified representatives selected by various appropriate units of non-supervisory employees at both plants (*ibid.*).[6]

[6] *Matter of Allegheny Ludlum Steel Corp.*, Case No. III-R-411, unreported (United Steelworkers of America, C. I. O., certified as exclusive representative of production and maintenance employees at Dunkirk plant, on June 29, 1942); *Matter of Bethlehem Steel Corp.*, 30 N. L. R. B. 1006, 32 N. L. R. B. 264 (Steel Workers Organizing Committee, C. I. O., certified as exclusive representative of production and maintenance employees at Lackawanna plant, on June 2,

In the course of investigating the petitions filed with it by the Foreman's Association, the State Board sought information from the Regional Director for the Third Region (Buffalo, New York) of the National Board, as to whether petitions concerning these employees had been filed with the National Board, and what action the National Board would take if such petitions were filed with the National Board. The Regional Director informed the State Board that no such petitions had been filed with the National Board and that, if petitions had been filed, the National Board, following its general policy, would have dismissed the petitions on the ground that units composed of supervisory employees are not appropriate for purposes of collective bargaining (No. 76, R. 45; No. 55, R. 56, 57). The Regional Director explicitly stated that this type of action by the National Board was not to be construed as a refusal to exercise jurisdiction, but rather as an assertion of jurisdiction resulting in dismissal of the case on the merits (No. 55, R. 56).

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1941); *Matter of Bethlehem Steel Corp.*, 47 N. L. R. B. 1330 (American Federation of Labor certified as exclusive representative of plant protection employees at Lackawanna plant, on March 31, 1943); *Matter of Bethlehem Steel Corp.*, 52 N. L. R. B. 1217 (United Steelworkers of America, C. I. O., certified as exclusive representative of employees in the Order Department at the Lackawanna plant, on November 15, 1943); *Matter of Bethlehem Steel Corp.*, 55 N. L. R. B. 658 (American Federation of Labor certified as exclusive representative of employees in the Fire Department at the Lackawanna plant, on April 18, 1944).

*Proceedings in the Allegheny case.*—On February 23 and 24, 1944, the State Board conducted a hearing, and on May 24, 1944, issued its Decision and Direction of Election in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WE–373 (No. 76, R. 9, 15–16, 20–38). In its Decision the State Board denied Allegheny's motion, made at the close of the hearing, to dismiss the Association's petition on jurisdictional grounds (No. 76, R. 9, 13, 21, 26–34). The State Board, relying on the fact that no petition involving these supervisors had been filed with the National Board, asserted that the National Board had not "taken jurisdiction of the particular question or controversy involved" in the case (No. 76, R. 29, 37). The State Board held that since the National Board would not order Allegheny not to bargain with the Association as the representative of the supervisory employees, an order by the State Board requiring Allegheny so to bargain would not be in conflict with any action of the National Board (No. 76, R. 29, 31–32). The State Board further held that the contrary findings of the National Board and the State Board on the question of whether supervisory employees could constitute an appropriate bargaining unit presented no conflict in a Constitutional sense because these findings related purely to a question of fact and "the possibility of different fact findings on the

same record by the National and the State Boards does not create a conflict of jurisdiction between them" (No. 76, R. 30–31). The State Board also stated that since the National Board did not hold bargaining units of foremen appropriate within the meaning of the National Act, and did not require employers to bargain with representatives selected by units of foremen, "the situation is exactly the same as if the National Labor Relations Act exempted foremen, like agricultural workers, from its coverage" (No. 76, R. 30). The State Board concluded that there was thus no federal regulation in the field and that "the State is, at the least, free to make its own regulations to govern the relationship between foremen and their employers located within the State" (*ibid.*).

On the merits, the State Board held that the unit of supervisory employees named in the Association's petition was appropriate within the meaning of Section 705, subdivision 2, of the State Act (No. 76, R. 34–36, 37–38), and that a question existed concerning the representation of the employees in this unit (No. 76, R. 33–34, 37); it directed that the question be resolved by an election by secret ballot (No. 76, R. 36, 38). On June 30, 1944, the State Board, following an election conducted pursuant to its Direction, certified the Association as exclusive representative of the employees in the unit which it had previously found appropriate (No. 76, R. 47, 54). On May

29, 1946, after the National Board had reversed the rule established in the *Maryland Drydock* case,[7] the State Board issued its Decision and Order in *Matter of Allegheny Ludlum Steel Corporation and Foreman's Association of America, etc.*, Case No. WU–404, finding that the Company had violated Section 704, subdivision 6, of the State Act by refusing to bargain with the Association, and ordered the Company upon request to bargain collectively with the certified representative.

While the representation proceedings which culminated in certification of the Association were pending before the State Board, Allegheny initiated this action on April 14, 1944, in the Supreme Court of the State of New York for the County of Chautauqua, requesting a declaratory judgment decreeing that under Article I, Section 8, of the Constitution of the United States, the State Board was without jurisdiction to determine questions concerning the representation of Allegheny's supervisory employees or to order Allegheny to bargain with a representative selected by such employees, and restraining and enjoining the State Board from taking any such action (No. 76, R. 7–14, 41). In its complaint, Allegheny alleged, *inter alia*, that of

[7] *Matter of Packard Motor Car Company*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; *Matter of L. A. Young Spring & Wire Corporation*, 65 N. L. R. B., 298; *Matter of Jones and Laughlin Steel Corp.*, 66 N. L. R. B. 386.

the products produced at its Dunkirk plant, approximately 95 percent in value was shipped to points outside the State of New York, and that of the raw materials used in the Dunkirk plant, approximately 86 percent in value was shipped from points outside the State of New York (No. 76, R. 10); that it was engaged, at its Dunkirk plant, in commerce within the meaning of the National Act (No. 76, R. 10–11); that the National Board was vested with exclusive power to determine appropriate bargaining units among the employees at that plant (*id.*); that the National Board had asserted jurisdiction over controversies concerning the representation of supervisory employees (*id.*); and that action by the State Board in certifying representatives selected by Allegheny's supervisory employees and in requiring Allegheny to bargain with such representatives, would conflict with the National Act as construed by the National Board (No. 76, R. 11–13). On May 24, 1944, the State Board served its answer praying that the complaint be dismissed (No. 76, R. 14–39, 41), and on June 2, 1944, filed a motion for judgment on the pleadings and for summary judgment (No. 76, R. 40). In its answer and in an affidavit supporting the motion for summary judgment, the State Board asserted, *inter alia,* that since no petition involving Allegheny's supervisory employees at the Dunkirk plant had been filed with the National Board, and since if such a petition had been filed

it would have been dismissed by the National Board, the National Board had not taken jurisdiction of the question involved in the State Board proceedings, and therefore the Constitution of the United States did not preclude the State Board from acting (No. 76, R. 19–20, 41–42, 45–46). Allegheny filed an affidavit in opposition to the motion (No. 76, R. 47–53), alleging, *inter alia*, that the National Board had determined generally, and in specific cases, that a unit of supervisory employees would not constitute a unit appropriate for purposes of collective bargaining, and that action by the State Board based on findings that such a unit is appropriate would conflict with the holdings and policy of the National Board (No. 76, R. 49–50, 52). The State Board filed a reply affidavit (No. 76, R. 53–57), asserting, *inter alia*, that the National Board would issue no order requiring Allegheny not to bargain with the representative selected by its supervisory employees and hence an order by the State Board requiring Allegheny so to bargain would not conflict with any order of the National Board (No. 76, R. 53–54, 56–57).

On July 27, 1944, the court issued its opinion holding that although Allegheny "is almost exclusively engaged in interstate commerce," the State Board retained jurisdiction to act because the National Board "has taken no steps to accept jurisdiction" (No. 76, R. 60–61). The court further held that although there was a "sharp

conflict between the policy" of the National Board and the State Board (No. 76, R. 61), the policy of the National Board amounted to no more than a refusal to exercise its authority, and that in the absence of "any intent upon the part of Congress [in the National Act] to cover the whole field of employer and employee relations in industrial plants engaged in interstate commerce * * * it cannot be said that the failure of the Federal Board to exercise its full power is in effect a controlling administrative ruling that no further regulation by either Federal or State government is proper or needful" (No. 76, R. 62–63). The court, therefore, granted the State Board's motion to dismiss the complaint (No. 76, R. 63), and on September 26, 1944, entered its order and judgment accordingly (No. 76, R. 2–6).

Allegheny appealed to the Appellate Division of the Supreme Court of the State of New York for the Fourth Department (No. 76, R. 1–2), which affirmed the judgment below without opinion on May 1, 1945 (No. 76, R. 64–66). Allegheny thereupon appealed to the Court of Appeals of the State of New York, "relying upon questions herein raised involving the construction of the Constitution of the United States of America" (No. 76, R. 63–64). On November 30, 1945, the Court of Appeals affirmed the judgment of the Appellate Division without opinion and remitted the case to the Supreme Court of the State of New

York for further proceedings (No. 76, R. 67–68). The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York for the County of Chautauqua on December 26, 1945, and judgment was entered thereon in the latter court on December 28, 1945 (No. 76, R. 68–71).

*Proceedings in the Bethlehem case.*—On November 9, 10, 11, 24, and 25, 1944, the State Board, over Bethlehem's objection on jurisdictional and constitutional grounds (No. 55, R. 49–50), conducted a hearing in *Matter of Bethlehem Steel Company and Foreman's Association of America, etc.,* Case No. WE–379 (No. 55, R. 20–22, 37–38, 46). This hearing was held on the Association's petition requesting the State Board to conduct an investigation and certify the Association as exclusive bargaining representative of a unit composed of supervisory employees employed by Bethlehem at its Lackawanna, New York, plant (No. 55, R. 21, 44–45). On November 15, 1944, the State Board issued a subpoena *duces tecum* directing Bethlehem to produce at the hearing certain documents allegedly bearing upon the supervisory status of the employees asserted in the Association's petition to constitute an appropriate unit, and also issued certain subpoenas *ad testificandum* directed to certain officials of Bethlehem (No. 55, R. 20–21, 22–26, 28–32). Upon refusal

of Bethlehem and its officials to comply with the subpoenas (No. 55, R. 23–24), the State Board sought enforcement of the subpoenas in the Supreme Court of the State of New York for the County of Erie (No. 55, R. 20–36). In response to an order to show cause issued by the court on February 7, 1945 (No. 55, R. 1, 19–20), Bethlehem and its officials submitted affidavits in opposition to the State Board's application for enforcement, alleging *inter alia* that more than 80 percent of the products produced at the Lackawanna plant valued in excess of $122,000,000 was shipped to points outside the State of New York, and more than 90 percent of the materials used in the plant valued in excess of $65,000,000 was delivered to the plant from points outside the State of New York (No. 55, R. 38); that the plant was engaged in commerce within the meaning of the National Act (No. 55, R. 49–52); and that the subject matter of the proceeding before the State Board was within the exclusive jurisdiction of the National Board and not within the jurisdiction of the State Board (No. 55, R. 50).

On March 1, 1945, the court issued a memorandum decision holding that its ruling on the constitutional questions was governed by the decision of the New York Court of Appeals in *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N. Y. 13, and by the decision of Mr. Justice Hinkley in *Allegheny Ludlum Steel Corporation* v. *Kelley, et al.*, 184 Misc. 47 (No. 55, R. 58), and

on the same day entered an order granting the State Board's application for enforcement of the subpoenas (No. 55, R. 2–18).

The order was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York for the Fourth Judicial Department on May 2, 1945 (No. 55, R. 60–61), and by the Court of Appeals of the State of New York on November 29, 1945 (No. 55, R. 62–63). On December 7, 1945, the Court of Appeals amended its remittitur, making it clear that the court had passed upon and rejected the contention that pursuant to Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States the National Board had exclusive jurisdiction over the question or controversy dealt with in the State Board proceeding (No. 55, R. 63–64).

Upon further appeals taken to this Court in both the *Allegheny* and *Bethlehem* cases, this Court on April 22, 1946, noted probable jurisdiction, consolidated the cases for argument, and requested the Solicitor General to participate (No. 76, R. 79; No. 55, R. 69–70).

## SUMMARY OF ARGUMENT

### I

A. When these cases arose the New York Board and courts were applying to the bargaining rights of supervisory employees a policy con-

flicting with that of the National Board. The refusal of the National Board to certify representatives of supervisory employees during that period was not a renunciation of jurisdiction over such employees, as the State authorities asserted, but was a manifestation of an affirmative policy founded on the Board's view that certification of bargaining units of supervisory employees would impair the freedom of the rank and file employees from supervisory pressure and militate against the accomplishment of the Act's main objectives. The Board continued to take jurisdiction over other types of cases involving supervisory employees. Thus when the State Board entertained the petitions in these cases and issued certifications it accomplished precisely that which the National Board was seeking to prevent, and thereby undermined the policy then being administered by the National Board. A State law may not under the Constitution be so applied as to interfere with the policy being administered under a Federal statute.

B. While the instant cases were pending on appeal below, the National Board changed its policy with respect to the bargaining rights of supervisory employees so that its policy is now the same as that which was applied by the New York Board in these cases. Nevertheless it is our view that the State action cannot stand.

1. Whether a Federal statute supersedes State legislation is primarily a matter of congressional

intention. This Court has assumed that the field in which Congress is seeking to prescribe an operative rule determines the limits beyond which it does not intend the States to encroach. Although we do not believe that determination of the "field" in which a Federal statute operates mechanically establishes the invalidity of State legislation in that field, we think that the confusion in administration which normally will result from the co-existence of two systems of regulation of the same subject justifies a presumption—the weight of which will vary with the circumstances—that Congress does not intend the field which it regulates to be simultaneously controlled by another sovereign. This we conceive to be the true meaning of the "occupancy of the field" cases, and the way in which they can be synthesized with the recent authorities stressing the importance of interference by the State statute with the operation of the Federal. In the present cases the State and Federal laws operate in exactly the same field, and the history of the National Act confirms rather than rebuts the presumption of an intention that the National Board have exclusive jurisdiction in that field. There is no basis for respondents' suggestion that the Federal statute controls the conduct of only those persons with respect to whom cases have been brought before the National Board.

2. Apart from any presumption as to occupancy of the field, the New York and federal statutes pro-

vide for different standards in determining appropriate bargaining units and thereby impose different and inconsistent obligations on employers. The necessities of practical administration of the National Act and the language and history of that Act lead to the same conclusion.

(a) Even when Federal and State agencies are applying the same policies, each is necessarily exercising the judgment of the individuals who compose it, with the result that decisions in identical cases are not necessarily the same. The possibility of different rulings as to bargaining unit boundaries clearly exists in any representation case, as experience demonstrates. Since Congress intended the provisions of the National Act to be effectuated uniformly in accordance with the judgment and discretion of the National Board, the exercise of authority by the State Board in lieu of the National impairs the full and complete attainment of the National policy.

The seriousness of this danger is aggravated by the fact that the very possibility that different boards may reach different decisions will cause parties, if they have a choice between boards, to take their case to the one whose decisions they anticipate will be the more favorable. The National Board frequently can not protect itself against such resort to a State agency, since it acts only when charges or petitions are filed with it. It is apparent that effective administration of the National statute will be impaired if persons may

resort to State boards for the deliberate purpose of obtaining decisions which would not be rendered by the National Board.

(b) The provision in Section 10 (a) of the National Act that the National Board is to have "exclusive" power which is not to "be affected by any other * * * law" was designed to prevent this very type of confusion, as the legislative history shows. Congress at that time was thinking in terms of the harmful consequences of the diffusion of responsibility at the Federal level, since there were then no comparable state laws. Clearly, however, the same considerations apply with even greater force to the exercise of concurrent jurisdiction by 48 states; it is highly unlikely that Congress would have been inclined to open the door to intrusions by State authorities which it closed to intrusions by Federal authorities. Section 10 (a) in terms would seem to apply to State laws as well as Federal. Other provisions of the statute support this conclusion.

## II

A. Although the problem is not involved in the instant cases, in order to make the Board's overall position clear, it seems desirable to point out that there are types of industries which the Board believes to be subject to its jurisdiction but in which it declines to handle cases; primarily because of budgetary limitations. In general it may be said that the Board will tend to refuse

borderline cases and those of largely local significance. In this field in which the National Board can but does not take jurisdiction it is obviously more consonant with the policy of the National statute to permit enforcement of State laws embodying the same policy than to leave the employees' rights without any statutory protection. The friction, confusion and uncertainty arising from the application of dual controls are non-existent where the National Board will not exercise its jurisdiction. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a). The National Board accordingly believes that the mere existence of the National Act should not deprive the States of power to apply a similar policy to employers over whom the National Board declines to take jurisdiction.

B. The Board's position is illustrated by its understanding with the New York Board whereby in practice the National Board has refrained from taking jurisdiction over local industries though they may have some interstate aspects and the New York Board has refrained from handling cases (except for those involving supervisory employees) in the industries customarily controlled by the National Board. Each Board recognizes the confusion inherent in a system of dual control. The result is that, save in the instant cases, the State Board has not entertained matters over which the National Board has consistently taken jurisdiction, and

conversely the National Board has refused to exercise jurisdiction over local industries, leaving the matter to the State Board. The sensible practice which the Boards have adopted may point the way to a wise solution of the over-all problem.

## ARGUMENT

These cases are concerned with manufacturing plants in the steel industry unquestionably subject to the authority of the National Labor Relations Board. Point I of the following discussion will be devoted to a consideration of the status under the National and the State labor relations acts of this type of predominantly interstate operation in an industry nation-wide in scope, the only question which these cases raise. In order that the Board's position may be completely clear, however, other aspects of the question of intergovernmental relations facing the Board are discussed in Point II. We take no position on other issues in the cases, including the State's contentions, made below, that the constitutional question cannot properly be decided in actions for declaratory judgment or subpoena enforcement.

## I

### THE NATIONAL LABOR RELATIONS ACT SUPERSEDES THE NEW YORK STATUTE AS IT HAS BEEN APPLIED IN THESE CASES

As the Statement indicates, these cases were begun and decided by the New York Board and the Supreme Court of New York when the New

York policy on bargaining rights of supervisory employees differed from that of the National Board. When these cases were before the Appellate Division and the Court of Appeals of the State of New York, the policy of the two Boards was the same in this respect. Since neither the Appellate Division nor the Court of Appeals wrote opinions, we do not know whether they took the change in National policy into account. It seems advisable to deal separately with the two periods.

A

THE STATE BOARD MAY NOT ENFORCE A POLICY CONFLICTING WITH THAT APPLIED BY THE NATIONAL BOARD

When the opinions of the New York Board and courts in these cases were written, the state and national Boards were applying contrary policies to the bargaining rights of supervisory employees. The New York authorities have not, of course, denied that when state and Federal statutes conflict, the latter prevails. The court below conceded (No. 76, R. 60) that if the rule applied by the State Board was in conflict with a national policy the state rule could not validly be applied to appellants. It sought to avoid finding such a conflict, however, by viewing the policy of the National Board in refusing to certify representatives selected by supervisory employees as a mere renunciation by the National Board of jurisdiction over the question of collective bargaining relations between supervisory employees

and employers (No. 76, R. 60–63). Adopting this view, the court below concluded in effect that there was no federal policy in the field with which the application of the state rule could conflict (*ibid.*). In so holding, we believe, the court below erred.

From the very beginning the National Board has exercised jurisdiction over questions involving the rights of supervisory employees, in industries subject to the National Act, to organize and bargain collectively. The Board has uniformly held that supervisors are "employees" within the meaning of Section 2 (3) of the National Act; it has uniformly held that supervisors possess the right to self-organization guaranteed in Section 7 of the National Act; and it has uniformly held that employer discrimination against supervisors which discourages their exercise of that right is violative of Section 8 (3) of the National Act.[8] Moreover, the Board has invariably held

[8] *Matter of Fruehauf Trailer Co.*, 1 N. L. R. B. 68, 76, enf'd, 301 U. S. 49; *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626, enf'd, 94 F. 2d 862, 870–871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Matter of American Potash & Chemical Corp.*, 3 N. L. R. B. 140, 158, 159, enf'd, 98 F. 2d 488 (C. C. A. 9), certiorari denied, 306 U. S. 643; *Matter of Star Publishing Co.*, 4 N. L. R. B. 498, 505, enf'd, 97 F. 2d 465 (C. C. A. 9); *Matter of Warfield Co.*, 6 N. L. R. B. 58, 61–64; *Matter of Atlantic Greyhound Corp.*, 7 N. L. R. B. 1189, 1196; *Matter of Horace Prettyman*, 12 N. L. R. B. 640, 655, 656, rev'd on other grounds, 117 F. 2d 786 (C. C. A. 6); *Matter of Skinner & Kennedy*

that in industries where collective bargaining by supervisors has long been customary, bargaining units composed of supervisors in whole or in part are appropriate within the meaning of Section 9 (b) of the National Act.[8] Indeed, prior to

*Co.*, 13 N. L. R. B. 1186, enf'd. 113 F. 2d 667, 671 (C. C. A. 8); *Matter of Luzway, Inc.*, 16 N. L. R. B. 37, enf'd 123 F. 2d 106, 108 (C. C. A. 2); *Matter of Eagle-Picher Mining & Smelting Co.*, 16 N. L. R. B. 727, enf'd. 119 F. 2d 903, 914 (C. C. A. 8); *Matter of Condenser Corp.*, 22 N. L. R. B. 347, 386–389, enf'd. 128 F. 2d 67 (C. C. A. 3); *Matter of Hazel-Atlas Glass Co.*, 34 N. L. R. B. 346, enf'd. 127 F. 2d 109, 117, 118 (C. C. A. 4); *Matter of Golden Turkey Mining Co.*, 34 N. L. R. B. 760, 776–779; *Matter of Shell Oil Co.*, 34 N. L. R. B. 866; *Matter of Whiting-Mead Co.*, 45 N. L. R. B. 987, 1013–1018, enf'd. 148 F. 2d 817 (C. C. A. 9); *Matter of Richter's Bakery*, 46 N. L. R. B. 447, enf'd. 140 F. 2d 870 (C. C. A. 5), certiorari denied, 322 U. S. 754; *Matter of Jones & Laughlin Steel Corp.*, 54 N. L. R. B. 679, enf'd. 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886; *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348.

Even before the National Act was passed, the self-organizational activities of supervisors were accorded protection by administrative agencies established by Congress to administer Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195. See, e. g., *Matter of Available Truck Co.*, 2 N. L. R. B. (old) 68; *Matter of Geuder, Paeschke & Frey Co.*, 2 N. L. R. B. (old) 393; *Matter of Pennsylvania-Dixie Cement Corp.*, 2 N. L. R. B. (old) 417.

[8] In the maritime trades the Board has consistently found bargaining units composed of masters, mates, and pilots to be appropriate. *Matter of International Mercantile Marine Co.*, 1 N. L. R. B. 384; *Matter of Lykes Bros. Steamship Co.*, 2 N. L. R. B. 102; *Matter of Black Diamond Steamship Corp.*, 2 N. L. R. B. 241; *Matter of Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369; *Matter of Ocean Steam-*

the *Maryland Drydock* case, the Board held that units of supervisory employees were generally appropriate for purposes of collective bargaining,

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*ship Co.*, 2 N. L. R. B. 588; *Matter of New York & Cuba Mail Steamship Co.*, 2 N. L. R. B. 595; *Matter of Seas Shipping Co.*, 8 N. L. R. B. 422; *Matter of Standard Oil of New Jersey*, 8 N. L. R. B. 936; *Matter of New York & Cuba Mail Steamship Co.*, 9 N. L. R. B. 51; *Matter of Tide Water Associated Oil Co.*, 9 N. L. R. B. 823; *Matter of Cities Service Oil Co.*, 10 N. L. R. B. 954; *Matter of Aerovox Corp.*, 10 N. L. R. B. 652; *Matter of The Texas Co.*, 23 N. L. R. B. 1022; *Matter of A. H. Bull Steamship Co.*, 36 N. L. R. B. 99; *Matter of Carnegie-Illinois Steel Corp.*, 37 N. L. R. B. 19; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366; *Matter of Draco Corp.*, 39 N. L. R. B. 846; *Matter of Federal Mogul Corp.*, 66 N. L. R. B. 532; *Matter of Kelsey-Hayes Wheel Co.*, 66 N. L. R. B. 570; *Matter of Celotex Corp.*, 66 N. L. R. B. 744. In the only case in which such a unit finding was contested, the Board's order was sustained by the circuit court of appeals. *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886.

In the printing trades the Board has often found bargaining units composed of both supervisors and rank and file employees to be appropriate. *Matter of Cullom & Ghertner Co.*, 14 N. L. R. B. 270; *Matter of W. F. Hall Printing Co.*, 51 N. L. R. B. 640; *Matter of Country Life Press Corp.*, 51 N. L. R. B. 1362; *Matter of Union Bag & Paper Corp.*, 52 N. L. R. B. 591; *Matter of A. S. Abell Co.*, 54 N. L. R. B. 62; *Matter of Times-Mirror Co.*, 54 N. L. R. B. 787; *Matter of Service Printers, Inc.*, 54 N. L. R. B. 1082; *Matter of Proximity Mfg. Co.*, 54 N. L. R. B. 1179; *Matter of Cincinnati Daily Newspaper Publishers Assn.*, 55 N. L. R. B. 571; *Matter of Leo Lichtenstein*, 55 N. L. R. B. 1429; *Matter of Rapidwax Paper Co.*, 56 N. L. R. B. 1774. Instances are not confined to the printing industry. See e. g., *Matter of Campbell Machine Co.*, 3 N. L. R. B. 793; *Matter of Merrimack Mfg. Co.*, 9 N. L. R. B. 173; *Matter*

and certified representatives selected by employees in such units.[10]

But while supervisors, in relation to their employers, are thus held to be "employees" within the meaning of Section 2 (3) of the National Act, the courts have also said that in relation to their subordinates supervisors are "employers" within the meaning of Section 2 (2). *National Labor Relations Board* v. *Skinner & Kennedy Co.*, 113 F. 2d 667, 671 (C. C. A. 8); *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886. For the economic power which employers vest in supervisory employees lends coercive weight to their conduct, as it does to the employer's own. Consequently when supervisors participate in organizational activity among rank and file employees their conduct is considered violative of the Act. See, e. g., *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520; *National Labor Relations Board* v. *Moench Tanning Co.*, 121 F. 2d 951, 953 (C. C. A. 2); *Birmingham Post Co.* v. *National Labor Relations Board*, 140 F. 2d 638, 639–640 (C. C. A. 5). The

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*of Willys-Overland Motors*, 9 N. L. R. B. 924; *Matter of Consumers Power Co.*, 9 N. L. R. B. 742; *Matter of Richmond Hosiery Mills*, 8 N. L. R. B. 1073; *Matter of Jones Lumber Co.*, 3 N. L. R. B. 855; *Matter of J. C. Sanders Cotton Mill Co.*, 31 N. L. R. B. 298; *Matter of Harris-Hub Bed & Spring Co.*, 13 N. L. R. B. 1236; *Matter of Coos Bay Lumber Co.*, 62 N. L. R. B. 93.

[10] *See notes 3, 4, supra*, p. 4.

Board has therefore been faced with the problem of accommodating the statutory rights of supervisors to the statutory rights of rank and file employees, an accommodation which requires insulation of the organizational activity of subordinates from supervisory pressure. It was this problem, primarily, with which the Board dealt, first in the *Union Collieries* case, then in the *Maryland Drydock* case, and later in the *Packard* case.

Upon balancing the organizational rights of supervisors against the rights of rank and file employees in the *Maryland Drydock* case, the Board arrived at the conclusion that in the state of self-organization existing in mass production industry, it was of greater importance to the attainment of the objectives of the Act that supervisors be excluded from organizations of rank and file employees than that supervisors be accorded the benefits of collective bargaining. The Board believed that if it held that supervisory employees in such industries constituted appropriate bargaining units, it would then be powerless to prevent the representatives selected by such units from amalgamating with rank and file representatives, creating a condition in which the supervisors might unduly influence the rank and file. It was for this reason, and in order to effectuate the policies of the Act, that the Board in that case established the rule that bargaining units of

supervisory employees in mass production industry were not appropriate within the meaning of Section 9 (b)."[11]

[11] Two years later, the Board, having observed that application of the *Maryland Drydock* rule led to frequent and serious strikes, disruptive of interstate commerce and war production, reconsidered the entire problem in the *Packard* case (61 N. L. R. B. 4). It there concluded that in view of the needs of supervisors for collective bargaining (61 N. L. R. B. at 8–12) and of the disruptions of commerce which had resulted from the Board's denial of protection to their right to bargain collectively (61 N. L. R. B. at 12–14), the rule of the *Maryland Drydock* case was not a satisfactory accommodation of interests (61 N. L. R. B. at 18–21). The Board, therefore, found that bargaining units of supervisory employees were appropriate, and announced that it would certify, as representatives of such units, labor organizations unaffiliated with rank and file representatives. For subsequent proceedings in the same case see 64 N. L. R. B. 1212, enforced August 12, 1946, 18 L. R. R. M. 2268 (C. C. A. 6). In *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, decided March 7, 1946, the Board gave further consideration to this question. It concluded that in view of the statutory grant of "full freedom" in the selection of representatives to all employees it was powerless to deny to supervisors, as to other employees, the right to be represented by any bona fide labor organization of their choice whether affiliated or unaffiliated. The present practice of the Board, therefore, is to certify as bargaining representatives of units of supervisory employees labor organizations which admit to membership rank and file employees as well as those which do not. The Board continues, however, to protect rank and file employees from supervisory pressure manifested by open and active support of or opposition to labor organizations which admit rank and file employees to membership. See e. g. *Matter of Climax Engineering Co.*, 66 N. L. R. B. 1359.

Both this approach and the approach adopted in the *Maryland Drydock* case represent, in our opinion, entirely reasonable exercises of the discretion vested in the Board to deal

This action by the Board cannot, we submit, be construed as a waiver of its statutory jurisdiction to determine the self-organizational rights of supervisory, as well as of rank and file, employees. The Board continued to protect supervisors who joined labor organizations composed of fellow supervisors against employer discrimination. *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348. It continued to find violative of Section 8 (3) of the Act the discriminatory discharge of supervisors who joined labor organizations composed of rank and file employees, when it appeared that the employer's motive in discharging the supervisor was to discourage rank and file membership in the organization. *Matter of Whiting-Mead Co.*, 45 N. L. R. B. 987, 1013–1018, enf'd 148 F. 2d 817 (C. C. A. 9). In no sense did the Board during this period treat supervisors as though they, like agricultural laborers, were excluded from the statutory definition of "employee" (Section 2 (3)).

The Board's action following the *Maryland Drydock* case in consistently dismissing petitions for investigation and certification of representatives involving units of supervisory employees, did not, as the New York Board and courts held, constitute a refusal to assert jurisdiction

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with the difficult problem of accommodating the primary interests of rank and file employees in freedom from supervisory pressure to the interests of supervisors in collective bargaining.

over the subject matter of such petitions. On the contrary, that action, as the Board's Regional Director for the Third Region informed the State Board (No. 55, R. 56), constituted an assertion of jurisdiction and affirmative holding that the units involved in the petition were not appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the National Act. The Board's action in dismissing a petition on this ground is no less an assertion of its statutory jurisdiction to determine the appropriateness of collective bargaining units (Section 9 (b)) and the existence of questions concerning representation (Section 9 (c)) than is the dismissal of a petition on the ground that the history of collective bargaining in the plant involved shows that the craft unit for which petitioner seeks certification is not appropriate;[12] or that the unit is inappropriate because employees otherwise eligible are excluded on the basis of race;[13] or that the unit is inappropriate because it includes but a single employee;[14] or on the ground

[12] National Labor Relations Board, *Third Annual Report* (1939), pp. 160–163; *Matter of Bendix Products Corp.*, 15 N. L. R. B. 965, and *Matter of American Can Co.*, 13 N. L. R. B. 1252, discussed in National Labor Relations Board, *Fifth Annual Report* (1941), pp. 65–66; National Labor Relations Board, *Tenth Annual Report* (1946), pp. 28–30.

[13] *Matter of Utah Copper Co.*, 35 N. L. R. B. 1295, 1300, and cases therein cited.

[14] Compare the contrary decision of the New York Board, enforced in *New York State Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 183 N. Y. Misc. 1064, 52 N. Y. S. 2d.

that no question concerning representation exists because the unit is covered by a valid collective bargaining agreement;[15] or because the petitioning labor organization is the successor of a union previously found to have been company-dominated.[16] When the State Board entertained foremen's petitions for an election and issued a certification, it accomplished precisely that which the National Board was seeking to prevent, and thereby undermined the policy then being administered by the National Board.

Certainly it could not be contended that if a State Board found that a craft unit is appropriate, in circumstances in which the National Board, following well defined policies would deem such a unit inappropriate, the State Board finding would not be in conflict with Federal law. Compare *United Office & Professional Workers* v. *Smiley*, 18 L. R. R. M. 2356 (E. D. Pa., Aug. 20, 1946), and discussion at p. 53, *infra*. Nor could it be contended that if a State Board di-

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590, affirmed, 269 App. Div. 934, 58 N. Y. S. 2d 343, 295 N. Y. 839, 66 N. E. 2d 853, with *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 193, and *Matter of Rosenhirsch Co.*, 38 N. L. R. B. 619, 621.

[15] National Labor Relations Board, *Third Annual Report* (1939), pp. 134–138; National Labor Relations Board, *Sixth Annual Report* (1942), pp. 55–56; National Labor Relations Board, *Ninth Annual Report* (1944), pp. 25–28.

[16] *Matter of Dade Drydock Corp.*, 58 N. L. R. B. 833, and *Matter of Standard Oil Co.*, 63 N. L. R. B. 990, discussed in National Labor Relations Board, *Tenth Annual Report* (1946), pp. 16–17.

rected an election at a time when the National Board, pursuant to its general policy, would refuse to conduct an election because it regarded an existing contract as a bar, the action of the State Board would not be in conflict with the administration of the National Act.

The State Board proceeded on the assumption that the Act has no effect except when the National Board has instituted proceedings. But it is the National statute, not the Board, which creates the obligations which employers are required to accept.[17] The Board construes and enforces these obligations, and the Board's interpretation of the Act is to be followed except where judicially disapproved.[18] The Act could not operate effectively if its substantive requirements were not to be heeded by any employer except where the Board has entered an order with respect to him. Like other statutes enforced by sanctions, the Act presupposes that its provisions

[17] Excepting for remedial requirements specified by the Board in its orders in particular cases.

[18] The National Board's interpretation of the National Act has not been challenged here. Congress has entrusted the effectuation of the policies of the National Act to the discretion of the National Board, and that Board has leeway to adopt even conflicting policies, as it deems advisable, so long as each has a reasonable basis in the law. The diverse opinions of the shifting majorities and minorities of the National Board on the supervisory employee question all, in our view, satisfy this test of reasonableness. Thus, the National Act, as interpreted by the National Board, has always controlled the obligation of employers to bargain collectively with supervisory employees.

will be observed by most law-abiding citizens without the necessity for enforcement by litigation. It is thus the Federal statute, as interpreted by the Board, and not merely the orders of the Board, which imposes obligations and duties upon the employer.

It is no answer to say, as the State Board has said, that the action of the State Board in finding appropriate bargaining units of supervisors and certifying representatives selected by such units is not in conflict with Federal law because, although the National Board would find to the contrary, it would not order the employers involved *not* to bargain with such representatives (Compare No. 76, R. 31–32, 56–57). The state's argument overlooks the difference between the effect of voluntary bargaining by the employer and bargaining compelled by law. The reason underlying the Board's refusal, in the *Maryland Drydock* case, to order collective bargaining with foremen was fear of interference with the bargaining activities of rank and file employees. Such interference was likely to be much greater if the employer was required by law to bargain with the foremen than if he merely was permitted to do so if he was willing. Obviously, for purposes of this policy it would be immaterial whether the legal obligation with which the employer was required to comply was enforced by a state board rather than by the National. In either case there would be the possibility of con-

flict, then regarded by the National Board as controlling, between the foremen treated as representatives of the employer and the foremen as employees.

The state has relied on cases which hold that state laws may be applied during a period in which a federal administrative body has exercised no authority over a subject which it may regulate. *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 297 U. S. 471; *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493. These decisions, which are predicated on the assumption that the federal act itself does not impose any operative regulation or manifest a congressional intention that the federal control be exclusive, have no bearing when the federal administrative body is applying federal law and policy, even though by inaction in the particular case.[19] The National Board, in refusing to entertain foremen's petitions, was enforcing its policy that employers not be required to bargain with foremen—a policy which would preclude state compulsion as well as national. The Board's inaction in this

[19] They may by analogy support state action with respect to industries or businesses which the National Board for administrative reasons does not subject to its authority. See pp. 66–77, *infra*. The analogy is not perfect, however, since the federal statute here itself imposes the obligation. See pp. 34–35, *supra*.

type of case thus manifests an intention to exclude the establishment of any other rule by a state. In these circumstances, "the failure of the federal official to exercise his full power is in effect a controlling administrative ruling that no further regulation by either federal or state government is needful. *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605." *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 170, Mr. Chief Justice Stone dissenting.[20] The *Napier* case, cited by Chief Justice Stone, and others like it, which hold that when the federal law is meant to establish an exclusive regulation, the state may not control the subject even in the absence of any steps by the federal agency, would seem to be most closely applicable. See, in addition to the *Napier* case, *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 271 U. S. 241; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370.

Thus during the period in which the state policy was contrary to the Federal with respect to certifying bargaining units of supervisory employees, it seems clear that the action of the State Board impaired the administration of the National Act by the body which Congress had charged with the administrative responsibility.

[20] With respect to the above proposition, there would seem to have been no divergence of opinion between the majority and dissenting opinions in the *Cloverleaf* case.

That the state may not enforce its policy in such circumstances would seem to be axiomatic. See *Hill* v. *Florida*, 325 U. S. 538; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751; *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Accordingly if the Court views the cases as of the time they were instituted by the New York Board, when the sole object of the petitioning foremen's union was to circumvent the policy of the National Board, it should unquestionably reverse the judgments below.

B

THE FEDERAL STATUTE SUPERSEDES THE STATE STATUTE, EVEN WHEN THE POLICIES BEING APPLIED UNDER THEM ARE THE SAME

As we have seen the New York State Board and courts have held that even during the period in which the Federal and State policies on the supervisory employee question were diametrically opposed, the State Board could exercise jurisdiction over and compel bargaining by employers and employees subjected by the National Board to the National Act, so long as the National Board had not entertained a proceeding against the same employer with respect to the very same matter. Inasmuch as the National Board has since changed its policy; the case in its present posture also involves the authority of the State Board when the Federal and State policies are not in conflict.

*1. The theory of supersedure and its application to these cases*

The principles which this Court has followed in determining when Federal law precludes the operation of state legislation have been repeatedly stated. Many cases, and particularly the recent ones, have declared that the question is whether the operation of the state law interferes with or otherwise impairs the effectuation of the policy of the national statute. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Many other cases dealing with the problem have sought to determine whether the state law invades "a field" occupied by Congress.[21] These cases hold that state action is superseded if Congress has "occupied the field."

In our view the controlling element underlying the determination whether Federal and state laws can stand together is the intention of Congress. Since the Federal statutes emanate from Congress, it is primarily for that body to determine their effect. If Congress expresses its intention as to whether state laws on the subject regulated shall stand or fall, that intention is controlling, assuming the subject to be one properly within

[21] E. g., *Second Employers' Liability Cases*, 223 U. S. 1, 54–55; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 274 U. S. 244; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Charleston & Car. R. R.* v. *Varnville Co.*, 237 U. S. 597; *Napier* v. *Atlantic Coast Line Co.*, 272 U. S. 605; *Southern Ry. Co.* v. *R. R. Comm. of Indiana*, 236 U. S. 439.

the Federal constitutional power. See *Prudential Ins. Co.* v. *Benjamin*, decided June 3, 1946, No. 707, 1945 Term. But in most of the cases which reach this Court, there is usually no express manifestation of congressional intention.

In the absence of any explicit showing of what Congress intended, it is necessary to examine the effect of the state law upon the operation of the Federal. If the provisions of the statutes conflict, or if the accomplishment of the policy of the state law will definitely prevent attainment of the policy of the Federal, the case is simple, since clearly Congress would not intend a state law to be so applied.

Often, however, it is not easy to determine whether the policies of the statutes conflict. That may depend on whether the Federal statute is conceived as designed only to govern a subject to the extent that it affirmatively regulates it, or is meant to prescribe a complete system of control with the intention that matters as to which no Federal requirements have been imposed shall be left free from regulation by the states. It was in cases raising issues of that sort that the concept of the "field" occupied by the Federal law became important. For the Court assumed that the field in which Congress was seeking to prescribe the operative rule, whether affirmatively or not, determined the limits beyond which Congress did not intend the states to encroach.

This does not necessarily follow. It might be perfectly obvious, even without any express showing of its intention, that Congress would have no objection to the application of harmonious state laws to the very transactions it was regulating. Thus a state price or wage control law prescribing exactly the same prices or wages as a Federal statute, but imposing penalties enforceable in the state courts, might lessen a difficult Federal policing problem and thus greatly facilitate enforcement of the Congressional policy.[22]

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[22] A number of state statutes and municipal ordinances punish violations of price regulations issued under the Emergency Price Control Act or rationing regulations under the Second War Powers Act. E. g., Laws of New York, 1942, chap. 445, 544, Sec. 7 (6) and New York State War Council Resolution of April 28, 1943; Rhode Island Laws, 1943, pp. 141-143; Wisconsin Laws, 1943, c. 550; California Stat. 1945, p. 164; New York City Administrative Code, Secs. U41-4.0, U41-5.0 (Local Laws 34 and 35, 1945). The ordinances and statutes are collected in OPA General Desk Book, Vol. 1, p. 5001, *et seq.* The Office of Price Administration has supported the constitutionality of such measures, which have been upheld in Michigan and New York, but invalidated in Ohio. *People* v. *Sell*, 310 Mich. 305, 17 N. W. 2d 193; *People* v. *Mailman*, 293 N. Y. 887, 59 N. E. 2d 790, affirming 49 N. Y. S. 2d 733, 182 N. Y. Misc. 870; *People* v. *Lewis*, 295 N. Y. 42, 64 N. E. 2d 702. Contra: *City of Cleveland* v. *Piskura*, 145 Ohio St. 144, 60 N. E. 2d 919. Similar state statutes, prepared with the assistance of the National Recovery Administration, implemented the National Industrial Recovery Act. See Comment, 33 Mich. L. Rev. 597 (1934); Note, 34 Col. L. Rev. 1077 (1934); Mayers, *A Handbook of N. R. A.* (2d Ed., 1934, pp. 397, *et seq.*); 1 U. S. Law Week 211 (1933), 911 (1934); Clark, *State Industrial Recovery Acts and*

Nevertheless, we believe that the concept of occupation of the field is not devoid of value, even though it should not be treated as a mechanical formula which will solve all difficulties. For we think it reasonable to assume, or presume, that the fact that Congress lays down a governing rule for a subject is a strong indication that Congress does not intend the very same subject to be regulated by another sovereign. Frequently the co-existence of two laws regulating the same subject, albeit not inconsistently, would result in such confusion and division of responsibility as to impair the effective operation of either. This, we submit, is the basis for the uniform line of decisions in this Court setting aside state laws which operate "in respect of the same matter" as Federal legislation (*Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 60), even in the absence of any showing of direct repugnancy. "Occupancy of a field" by a Federal statute may properly be regarded as a factor presumptively, though not conclusively, establishing an intention that the subject regulated is to be governed exclusively by that statute.

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*State Codes*, 20 A. B. A. J. 343 (1934); *Darweger* v. *Staats*, 267 N. Y. 290, holding New York law invalid; *In re Lasswell*, 1 Cal. App. 2d 183, holding California law valid. References to other Federal statutes, including the Pure Food and Drug Act, Migratory Bird Treaty Act, and Federal Narcotic Act, which have been incorporated in state laws, are contained in Comment, 33 Mich. L. Rev. 597, 601–603 (1934). As to the Pure Food and Drug Act, see *Smith* v. *Alphin*, 150 N. C. 425, 428, 64 S. E. 210.

The strength of such a presumption probably will vary with the particular situation. When a Federal law does not establish a rigid regulatory scheme (such as the price and wage illustrations referred to above), but depends to any substantial extent for its effectuation on the discretion of a congressionally established administrative body, there is special reason for assuming that the Federal regulation is to be exclusive. Since discretionary matters will inevitably be handled differently by different individuals, submission of a matter to a state agency, even one applying the same general policy, may produce a different result than submission to the Federal. If parties can choose between Federal and state tribunals in such circumstances, a petitioner will select that which he believes more favorable to him. If that should be the state agency, the congressional intention that the enforcement program be administered in accordance with the discretion to be exercised by the Federal body will be undermined. Thus, at least presumptively, it would appear that in many situations determination of the scope of the Federal regulatory statute—of the "field" which it regulates—would in itself determine the bounds of permissible state action, that is, state action which will not interfere with the attainment of the congressional objective. It is this analysis which has led us to believe that the "field" approach to the problem, regarded as establishing a presumption, is not only consistent

with but in its essence an application of the underlying test whether the state law impairs the effectuation of the Federal policy.

These principles apply whether the Federal statute is regulating transactions which are themselves interstate or matters which affect interstate commerce. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156–157. Clearly the potentialities of confusion in administration resulting from a system of dual control are the same in either situation. Where the regulation of intrastate activities affecting interstate commerce is "intended to solve a national problem on a national scale", as is the National Labor Relations Act (*National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123), there is particular reason for applying the customary rule.

We are aware that the Court has frequently had difficulty in determining just what "field" a Federal statute was meant to occupy. In many of these cases the Federal statute actively regulated some aspects of a subject but not others, and the question was whether Congress meant to cover the whole subject or merely the affirmatively regulated portions.[23] In another series of cases Congress

[23] E. g., *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Savage* v. *Jones*, 225 U. S. 501; *Kelly* v. *Washington*, 302 U. S. 1.

did not itself lay down any operative rule, but authorized an administrative body to do so in specified situations; the issue was whether the "field" was federally occupied when the administrative body had not exercised its authority.[24] None of these cases, however, expresses any doubt as to the status of state laws within whatever is conceived to be the federally regulated "field". As Mr. Justice Stone noted in his dissent in *Hines* v. *Davidowitz*, 312 U. S., at 78, "* * * we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." Once the boundaries are known, however, it appears to have been assumed that state action within those boundaries is foreclosed.

In none of the cases, including those upon which appellee relies and those adopting the less mechanical approach, has the Court permitted state

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[24] Cases holding that Congress intended the Federal statute to be exclusive even in the absence of Federal administrative action: *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87; *Alabama and V. Ry.* v. *Jackson and E. Ry.*, 271 U. S. 244; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370. Cases holding the contrary: *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 297 U. S. 471; *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493.

laws to govern those matters which were simultaneously and affirmatively being subjected to regulation by the Federal Government.[25] As to those matters which Congress has affirmatively regulated—or which an administrative agency is affirmatively regulating—the Court has always assumed that Congress did not mean them to be subjected to state regulation as well. And this has been assumed to be so whether or not the state law was in conflict with the Federal. As Mr. Justice Holmes stated for the Court in *Charleston & Car. R. R.* v. *Varnville*, 237 U. S. 597, 604: "When Congress has taken the particular subject-matter in hand coincidence is

[25] The opinion of Mr. Justice Frankfurter, dissenting, in *Hill* v. *Florida*, 325 U. S. 538, 547, which rejects the use of "mere generalities about Congress having 'occupied the field'" (325 U. S., at 552), approvingly quotes passages from a number of opinions which declared, for example (325 U. S., at 550):

> "* * * that the intention to supersede the exercise by the State of its authority *as to matters not covered by the federal legislation* is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." [Italics supplied.] *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n*, 283 U. S. 380, 392–393.

See also the passages quoted from *Savage* v. *Jones*, 225 U. S. 501, 533; *Missouri K. & T. R. Co.* v. *Harris*, 234 U. S. 412, 418–419, and *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 60. Mr. Justice Frankfurter's opinion recognizes that state and federal laws cannot stand together if "as a matter of language or *practical enforcement*" they "collide." [Italics supplied.] It is the problem of "practical enforcement" which has led the National Board to urge that even consistent state laws may not be applied to industries over which the Board is exercising its authority.

as ineffective as opposition * * *". See also *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 448; *Missouri Pacific R. R.* v. *Porter*, 273 U. S. 341, 345–346.

In the present cases there can be no dispute as to the boundary of the "field" regulated by the National Act. For present purposes we are concerned only with the employer's obligation to bargain with supervisory employees. At all times the National Board has construed the National Act as governing this obligation. See pp. 25–32, *supra*. Since this is precisely what New York has purported to regulate, it can not be said here that the state is legislating as to "phases" of the subject "left unregulated by the nation". *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S., at 155. The national and state laws are thus clearly operating in the same field. We are aware of no considerations which would tend to rebut the normal presumption that in these circumstances the state law as applied cannot stand.

New York seems to assume that the field in which its statute operates is of no consequence in so far as it handles cases which had not been brought before the National Board. This argument fails to recognize that obligations are imposed by the National Act itself. We know of no prior case in which it has even been urged that in a field regulated by Congress a state retains jurisdiction over all parties except those against whom a national agency has instituted administrative proceedings in a particular case.

Those decisions in which state laws have been held to have been superseded by federal statutes which did not affirmatively govern the subject of the state regulation [26] rejected much less extreme contentions.

We have already shown that the cases upon which New York relies [27] which permit state laws to stand during a period in which a Federal administrative board has exercised no authority over the subject are not controlling. To hold, as these cases do, that unexercised discretionary power, which leaves an entire subject matter completely unregulated by Federal authority does not exclude state control is a far cry from holding that failure to exercise administrative authority over a specific issue or controversy in a field where Federal regulation is operative—in the instant case, the collective bargaining rights of foremen—likewise does not exclude state control. And it is an even farther cry from holding that absent the exercise of administrative authority over the specific parties involved in a controversy, the states remain free to apply their law, despite the fact that Federal law is applicable to the specific controversy and a Federal agency is continually exercising jurisdiction over identical questions.

In the present cases we are of the view that the same result must be reached irrespective of

[26] See cases cited in notes 23, 24, *supra*, pp. 44–45.

[27] See p. 36, *supra*.

how the problem is approached. Here the state law, as enforced, reaches a subject affirmatively regulated by the national statute. Under the cases—all of them so far as we are aware—this in itself would be sufficient to compel the holding that the state law cannot stand. If occupancy of the same field by Congress is regarded as creating merely a presumption of intention to supersede, the presumption would be controlling, for the history of the National Act confirms rather than rebuts it. See pp. 58–66, *infra*. And if we disregard the uniform assumption in the cases and look only to the practical effect of a dual system of control over labor relations, we shall show that this will interfere with and obstruct the operation of the National Act. The language and history of the National Act and the necessities of practical administration under it lead to the conclusion that, as to those matters which it regulates and those employers over whom the National Board is exercising jurisdiction, the Federal statute was intended to be exclusive apart from any notion of occupying the field.

*2. The effect of applying State laws to industries controlled under the National Act*

It is not necessary to elaborate on the interference with the administration of the national statute which results from application to the same employers of a state law containing conflicting provisions, or of a state policy differing from

that of the National Board. Cf. Point I A, pp. 24–38. In so far as the determination of the appropriate bargaining unit is concerned, the New York and National Acts provide different standards. The former, but not the latter, gives preference to a craft unit when the employees so decide.[28] Cf. Section 705.(2) of the New York Act with Section 9 (b) of the National Act. And the State

[28] A number of state laws, in addition to the New York statute cited in the text, require state administrators to find craft units appropriate whenever a majority of employees in a particular craft so decide. Minnesota Stats. (Mason, 1940 Supp.), Ch. 23, Sec. 4254–36 (b); Wisconsin Stats. (1939), Sec. 111.02 (6); Laws of Rhode Island (1941), Ch. 1066, Sec. 6 (2); Pennsylvania Stats. Ann. (Purdon, 1945), Title 43, Sec. 211.7 (b); Connecticut Stats. (1945 Supp.), Ch. 279, Sec. 338h (2). The National Act contains no such provision, and the National Board does not follow that policy except in cases where other factors bearing upon the appropriateness of a craft unit are evenly balanced. National Labor Relations Board, *Third Annual Report* (1939), pp. 167–174; *Eighth Annual Report* (1944), pp. 53–55. Illustrative of both different statutes and different policies are those relating to supervisory employees. Section 16 of Alabama's Bradford Act (Act of Alabama, 1943, No. 298, page 253, Code 1943, Tit. 26, Sec. 376, *et seq.*), involved in *American Federation of Labor v. McAdory*, 325 U. S. 450, makes it unlawful for, *inter alia*, "supervisory" employees to join or retain membership in labor organizations which, either themselves or through their affiliates, admit other classes of employees to membership. Section 16 (b) of the Minnesota Act (Laws of Minnesota, 1939, Ch. 440, Mason's Minnesota Statutes, Supp. 1940, Ch. 23, Sec. 4254–36 (b)), provides that supervisory employees "shall not be considered" by the Conciliator in fixing units. Each of these state laws is inconsistent with the Board's present policy. The New York Board, going to the other extreme, followed the contrary policy even during the *Maryland Drydock* period.

Board cannot designate a unit which extends beyond the State's borders, although the National Board can and frequently does designate multi-state units. See, for example, *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146. These factors in themselves show that the State and Federal regulations of collective bargaining impose different and inconsistent obligations on employers.

We believe that in practical operation there also will be interference and difficulty from the very fact of the existence of two boards regulating the same subject matter. This in itself gives the parties a choice of forums and leads to the inefficiencies and confusion of dual controls.

Even when the statutory provisions and the policies applied by the boards administering them are the same, the decisions in particular cases may differ. The administration of the labor relations acts calls for the exercise of judgment and discretion by the board members, both in finding facts and in deciding what orders should be entered. Thus in every representation case, judgment must be exercised as to the breadth of the approved bargaining unit. The experience of administrative agencies, as well as of courts, demonstrates that different individuals will often arrive at different conclusions in deciding the same issue. In addition, even on the same issue, different agencies may be confronted with differ-

ent records as a result of differences in investigative facilities, and this may cause the agencies to reach different conclusions.

An example of the confusion resulting from differing judgments in the course of applying similar policies to the same facts is *Matter of Creamery Package Mfg. Co.*, N. L. R. B. Case No. XII–R–341, R–2705; Wisc. Emp. Rel. Bd. Case III, No. 348 E–117. On an employer's petition the Wisconsin Board defined all office employees except supervisors as a bargaining unit, and ordered an election. The National Board, acting on the Union's petition, prescribed the same unit except that it also excluded confidential employees. Each board certified the same labor organization, but as a result of the uncertainty as to the proper unit, a strike was threatened before the National Board's determination was finally accepted.[20]

Another illustration is the treatment of petitions filed by allegedly independent unions, although the statutory provisions with respect to company-dominated unions are substantially the same in state laws as in the National Act. Because experience has revealed that many employers have in the past formed company-domi-

[20] Letter from Robert B. Watts, General Counsel, National Labor Relations Board, to Charles Fahy, Solicitor General, dated February 7, 1942, printed as an Appendix to the Memorandum for the United States as Amicus Curiae in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, No. 252, October Term, 1941, pp. 32–34.

nated organizations in the guise of independent unions, the National Board carefully investigates the origins of independent unions before permitting them to appear on a ballot. Some State Boards apparently either conduct no such preliminary investigation, or are content with a less thorough investigation. The result is that, as in *Matter of Fox River Valley Knitting Co.*, N. L. R. B. Case No. XII–C–742; Wisc. Emp. Rel. Bd., Case 1, No. 432E–149, an "Independent" union may be certified as bargaining representative under a State Act, which under the National Act would be found to exist in violation of law, subject to disestablishment.

The possibility of different rulings clearly exists in any representation case. See the situation described in *United Office & Professional Workers v. Smiley*, 18 L. R. R. M. 2356 (E. D. Pa., Aug. 20, 1946); and compare *Matter of Wilson-Hubb Mfg. Co., Inc.*, 68 N. L. R. B. 853; *Matter of Evinrude Motors*, 66 N. L. R. B. 1142. With respect to foremen's petitions such as are involved in these cases, the State and National Boards (the latter after the *Packard* decision) might fix different limits for bargaining units, as in the *Creamery Package* case, or the National Board might hold the petitioning organizations to be company-dominated when the State Board would not.

Thus even when the statutes and administrative policies are the same, cases may be decided differently. Since Congress intended the provi-

sions of the National Act to be effectuated in accordance with the judgment and discretion of the National Board, the exercise of authority by the state boards in lieu of the National impairs the full and complete attainment of the National policy.

The seriousness of this impediment is aggravated by the fact that the very possibility that different boards may reach different decisions will cause parties, if they have a choice between boards, to take their case to the one whose decisions they anticipate will be the more favorable. Whether they resort to federal or to state authority is not likely to depend on the character of the employer's business, or its relation to interstate commerce, but solely on an evaluation of which body is likely to be more hospitable to their particular interests. If a union or employer (where an employer can invoke the services of the board) believes it will fare better before a state board—whether because of differences in the statute, the administrative policy, the presence or absence of superior fact-finding facilities, or the attitude or philosophy of the personnel—it will file its charges there, with the deliberate intention to obtain a decision which would not be reached by the National Board. It is necessary to go no further than these cases to illustrate this. Although all other representation proceedings at the appellants' plants have been

handled by the National Board, the foremen's organization went to the State Board because it knew that the National Board would dismiss its petition. Each of the examples described above (*supra*, pp. 52–53) affords an additional illustration of situations in which parties might be inclined to "shop around" for the more favorable Board.

As Mr. Justice Higgins stated a number of years ago with respect to a comparable situation in Australia [80]:

> At present, the unions are only too apt to treat the state and federal courts as competing shops, and they resort to the shop which is likely to grant them the most.

How unwholesome that situation is was pointed out sharply in the testimony of National Board Chairman Herzog on the Case Bill. Discussing duplication of function on the Federal level he said (Hearings, Senate Committee on Education and Labor, on H. R. 4908, 79th Cong., 2d Sess., p. 290):

> I do not think * * * that it either enhances the dignity or the effectiveness of the Government of the United States to make it easy for employers or labor unions to shop around among agencies, in search of the one that is most likely to support their views. The surest way to avoid this

[80] Higgins, *A New Province for Law and Order*, 34 Harv. L. Rev. 105, 132 (1920).

danger is to preclude duplication of function.

The confusion which must inevitably result from dispersion of authority is the very thing which, as we shall show, Congress deliberately sought to avoid.

Although a decision of the National Board in a particular case will, of course, supersede any prior state ruling, this power of supersedure is insufficient to prevent the practice of "shopping around" to which we have referred. For the National Board acts on questions concerning representation or alleged unfair labor practices only when petitions or charges are filed with it. In some situations, as where there are competing unions, an opposing party might bring to the National Board a case which had been previously submitted to a state agency. But, as in the present cases there may be no one in a position to do this, with the result that although the National Board may be aware that a state board is reaching a decision which it believes improper, there is nothing it can do to remedy the situation. The consequence then is that a party has his choice of forum, and that a state decision which the National Board would not have reached can not be disturbed.

Furthermore, it is apparent that the power of the National Board to issue a superseding order does not remedy the confusion in labor relations which ensues when a case which would otherwise

be taken to the National Board is first brought before a state agency for the purpose of obtaining a different decision. Even if that case subsequently be presented to the National Board, the passage of time, with the resultant continuance of an unsettled state of affairs in a plant, impairs the accomplishment of the objectives of the National statute.

Moreover, uniformity of application is particularly essential to the effectuation of Federal policy in the large interstate industries over which the National Board continuously exercises jurisdiction, such as the one involved in the instant cases. For such an industry serves national markets, and maintenance of competitive conditions requires that regulation in the field of labor relations be uniformly applied. Single companies may have plants in many States and employees of such companies may all belong to a single labor organization and be covered by a single collective bargaining agreement. To permit variations in the rights and obligations of the parties in matters covered by Federal law merely because of variations in the local policies of the several states wherein they happen to reside or be employed would result in the discrediting of national policy and in the burdening of its administration with discrepancies wholly unrelated to the national objectives.

For these reasons we believe that, for those industries which the Board is regulating, to permit

the states to enforce their own regulation of the same aspects of labor relations interferes with and lessens the effectiveness of the administration and enforcement of the National Act.

*3. The language and history of the National Act*

The language and legislative history of the National Act support the position that Congress meant to create a body having exclusive and not merely concurrent authority.

Section 10 (a) gives the Board exclusive authority to administer the Act in all situations coming within its purview. It provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

This grant of "exclusive" power to the National Board to prevent any person (covered by the Act) from engaging in unfair labor practices, is on its face a conclusive declaration that no other agency, by whatever sovereignty constituted, may perform the functions lodged with the Board. Compare *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

The Senate Committee, in explaining the necessity for such a grant of power, commented as fol-

lows on the then existing situation respecting the application and enforcement of Section 7 (a) of the National Industrial Recovery Act, for which the National Labor Relations Act was to be substituted (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 4–5):

> (3) *Excessive diffusion of administrative responsibility.*—Today a wide variety of independent industrial boards, from 13 to 15 in number, are entrusted with the administration of section 7 (a). The present National Labor Relations Board has no appellate jurisdiction over any board established pursuant to an industrial code, either in respect to findings of fact or interpretations of law. And as there are now over a hundred codes which make some provisions for the creation of such boards, it could be only a matter of time until this diffusion of authority would reach extraordinary proportions.
>
> None of these boards has any actual power within itself to enforce section 7 (a). And even if such power could be granted wisely to a multitude of agencies, these boards are unsuited to the purpose. Largely bipartisan in character, they live in an atmosphere of conciliation and compromise that may be admirably suited to the settlement of wage and hour disputes where shifting standards must be applied to variegated local needs. ***But section 7 (a) is a uniform national policy established by law of Congress. As such it must receive uniform interpretation***

> *everywhere;* it must be enforced by a judicial process rather than broken by compromise; and its enforcement must reside with governmental rather than with quasi-private agencies. [Italics supplied.]

The House Committee likewise referred to the detrimental effects which had resulted from "the diffusion of responsibility and conflicting interpretations in regard to Section 7 (a)." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 9.

Section 10 (a) was designed to remedy this condition. The Senate Committee explained (S. Rep. No. 573, p. 15):

> Section 10 (a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of Federal American law regarding collective bargaining.

It is true, of course, that Section 10 (a) and these comments of the Committee concerning it, were directed at the diffusion of responsibility which had up to that point existed on the Federal level. There had been no experience with diffusion resulting from state action, for prior to

the passage of the National Labor Relations Act, the states had not entered the field covered by Section 7 (a).[31] But it does not follow from this that the grant of exclusive jurisdiction to the National Board in Section 10 (a) refers only to its jurisdiction in relation to other Federal agencies, and that reference in that Section to the supersedure of other "laws" connotes only Federal laws. Neither the Board nor this Court has so interpreted the Section. See *Matter of Eppinger & Russell Co.*, 56 N. L. R. B. 1259, referred to with approval in *Hill* v. *Florida*, 325 U. S. 538, 542; compare *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267–269.[32]

This conclusion that Congress intended in Section 10 (a) to exclude state as well as Federal agencies from the field is confirmed by the fact that the Section reflects Congressional concern over the detrimental effects of dispersion of authority. In the face of its declarations that it

[31] There is one possible exception to this statement. In 1931, Wisconsin enacted statutes declaring that it was the public policy of the State to favor collective bargaining and non-interference by employers in self-organizational activity. Wis. Stats. (1933), §§ 268.18, 133.07. In *Trustees of Wisconsin State Federation of Labor* v. *Simplex Shoe Mfg. Co.*, 215 Wis. 623, 256 N. W. 56, the Wisconsin Supreme Court held that this statute created legal rights enforceable by injunction against employer interference.

[32] See also, *Matter of Twin City Milk Producers Ass'n*, 61 N. L. R. B. 69; *Matter of Northern States Power Co.*, 37 N. L. R. B. 991; *Matter of Rock River Woolen Mills*, 18 N. L. R. B. 828.

desired to establish "a single paramount administrative or quasi-judicial authority" in connection with the development of collective bargaining law on a national level (*supra*, p. 60), and that it intended the National Act to be paramount over all other laws which might touch on even "similar" subject matters (*id.*), it is highly unlikely that Congress would have been inclined to open the door to intrusions by state authorities which it closed to intrusions by Federal authorities. The considerations which convinced the Congress of the undesirability of permitting more than one Federal agency to operate in this field are applicable, of course, to an even greater degree, to the exercise of authority by the 48 States.

Nor does it follow, contrary to the view expressed by the New York Court of Appeals in the Davega case,[33] that because Section 10 (a) speaks only in terms of the Board's power to enforce and administer the National Act, and not in terms of the applicability of the Act itself, state agencies remain free to perform the very

[33] *Davega City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13, 22 N. E. 2d 145. It may be noted that pursuant to the understanding between the National and the State Boards (see pp. 71–77, 91–106, *infra*), cases involving the retail stores operated by Davega would have been handled only by the latter. Indeed in the *Davega* case the Court of Appeals noted that "the record shows that the appellant was informed by the Regional Director of the National Board, albeit not by formal order, that the Board would not assume jurisdiction." 281 N. Y. at 24, 22 N. E. 2d at 149.

functions and decide the very question which Congress entrusted exclusively to the National Board, as long as the state agencies operate under the guise of interpreting state statutes rather than the National Act. See 281 N. Y. 13, 24, 22 N. E. 2d 145, 148–149; see also the decision of the Wisconsin Supreme Court in *Wisconsin L. R. B.* v. *Rueping Leather Co.*, 228 Wis. 473, 483–484, 279 N. W. 673, 677–678. Section 10 (a) specifically declares that the Board's exclusive power is not to be affected by any other machinery established by "law"—which obviously means other laws, and would seem to include state laws. The suggested construction would plainly interfere with the centralized administration, uniform interpretation, and unitary responsibility which Congress avowedly sought to achieve through the enactment of Section 10 (a). As we have shown, pp. 49–58, *supra*, this has been in practice the result of application of these views by agencies administering state acts similar to the Wagner Act.

The one Section of the Act which in terms refers to "local agencies," empowers the Board to "utilize" such agencies in the course of performing its functions under the Act (Section 4 (a)). If any implication can be drawn from this language, it would be that local agencies can enter the field only if their services are "utilized" by the Board.

We do not believe that the peculiar problem presented by the industries not reached by the Board, discussed in Point II A, *infra*, pp. 66–77, warrants not giving Section 10 (a) the meaning Congress intended it to have with respect to the mass of industries whose labor relations are governed by the National Board. If Sections 10 (a) and 4 (a) are read together the Board can be said to be exercising its authority by utilizing the services of local boards when it refuses to assert its authority in cases over which it has Commerce Clause jurisdiction and remits the petitioning party to his rights and remedies before a State Board. For while it would seem that Congress did not intend to permit state authority to operate independently of Federal authority in the field covered by the National Act, the provision which empowers the Board to utilize the services of local agencies would seem to sanction the National Board's practice of in effect remitting to state boards cases in borderline industries which for budgetary reasons the National Board is unable to handle. See pp. 66–71, *infra*.

There are other indications that Congress did not intend to allow state boards to exercise concurrent jurisdiction with the National. The problem of employee fraud and violence was deliberately left to the states to control. S. Rep. No. 573, 74th Cong., 1st Sess., p. 16. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*,

315 U. S. 740. It had also been suggested that the National Act should deal with the question of the legality of closed shop contracts beyond mere illegalization of such contracts if executed with employer-assisted or dominated labor organizations, or with minority unions (Section 8 (3)). Compare *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685. The Congressional Committee rejected this suggestion on the stated ground that Congress did not desire to interfere "with the laws of the several States on this subject." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11–12; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20.

These specific statements by the Congressional Committees that the failure of the statute to cover certain subjects in the general field with which the legislation dealt was not to be deemed to preclude state regulation of those untouched subjects strongly suggest that in regard to those matters which were covered in the statute Congress intended to preclude state control entirely. This inference is further supported by the fact that, in contrast to other contemporary legislation, the National Act contains no clause declaring that state laws bearing on the same subject matter shall not be abrogated. See, e. g., Securities Act of 1933, Sec. 18, 48 Stat. 74, 85, 15 U. S. C., Sec. 77r; Securities Exchange Act of 1934, Sec. 38, 48 Stat. 881, 903, 15 U. S. C. Sec. 78bb. Cf. Fair Labor Stand-

ards Act, Sec. 18, 52 Stat. 1060, 1069, 29 U. S. C. Sec. 218."

## II

### THE PRACTICAL PROBLEM CONFRONTING THE BOARD

For the reasons heretofore stated, we submit that the Board's authority over such an interstate industry as is here involved is exclusive. It is not necessary to go further in order to dispose of these cases. Nevertheless, in order that the Board's position and practice may be made entirely clear to the Court, it seems desirable to refer to the Board's policy in other types of industries, and to the manner in which, outside of the present cases, it has worked out an arrangement with the New York Board for avoiding overlapping or duplication. This practical adjustment, we think, suggests a reasonable solution to the problem of concurrent authority.

#### A. THE CASES WHICH THE NATIONAL BOARD DOES NOT HANDLE

We have stated what we believe to be the unsettling effect of a concurrent state and Federal

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[34] While it is true that at the time of the passage of the Act there were no state laws like the National Labor Relations Act (but see note 31, p. 61, *supra*) which would be directly affected by the presence or absence of a savings clause, this fact does not wholly vitiate the effect of its omission. For, as we have indicated above, Congress was aware of, and concerned with, the relation of the National Act to state power in the field and made a deliberate choice as to "what matters [were] to be taken over by the central Government and what to be left to the States." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647.

jurisdiction over labor relations. That discussion presupposed that the National Board was actively exercising its authority, as it does in the major interstate industries and in most fields subject to its jurisdiction. The National Board does not, however, handle all cases which are subject to its constitutional jurisdiction under the Commerce Clause. It makes a selection among the cases which are filed with it.

We are not concerned here with cases which the Board turns down because it regards them as insubstantial on the merits, or because it has a substantive policy against granting relief in a particular type of situation. Apart from these, there are cases in which the Board does not even inquire into the merits, but which it nevertheless refuses to entertain. In some of these cases, of course, the Board may feel it lacks power under the Commerce Clause. These clearly fall within the jurisdiction of the states, and they present no problem here. There are other cases, which may be said to fall on the border line of commerce jurisdiction, which the Board does not take although it does not disclaim authority over them. And there are other cases which the Board refuses to handle which do come within its constitutional power, although these are generally closer to the constitutional boundary than the cases which the Board customarily hears.

The necessity for this abnegation is in large part budgetary. With the appropriations avail-

able to it there has always been a limit to the case load which the Board can handle. In deciding what cases shall be heard, the Board lays down no hard and fast rule, but is guided by its judgment as applied to each situation which comes before it. Its judgment is not arbitrary, however, but is exercised in a manner which it thinks will best accomplish the purposes of the Act. The Board regards these purposes as best effectuated by applying the Federal Act to the industries most clearly covered by it, which engage in interstate commerce on a large scale, and on occasion to particular businesses with respect to which labor disturbances resulting from violations of the Act would obstruct the flow of interstate commerce substantially. In general—and it is not simple to generalize—it can be said that the Board will tend to refuse cases as to which it has doubts of its constitutional jurisdiction, or, even though constitutional jurisdiction is not in question, which are primarily of local significance.

The line may not be drawn entirely on an industry basis. Where interference with the operation of the local transit company in Baltimore was thought to affect interstate and foreign commerce substantially the Board took the case,[35] although it has both previously and subsequently turned down cases with respect to other transit companies. The Board might also take into ac-

[35] *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51 (C. C. A. 4), certiorari denied, 321 U. S. 795.

count in making a choice the fact that the policy of the National statute would be enforced under a state law—a factor which this Court has indicated is entirely appropriate for the Board to consider. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 223. There would be less reason to apply the National Act in that circumstance than otherwise.

In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a). See pp. 58–66, *supra*. The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are nonexistent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean

that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. (See, for example, the National Board's declaration as to New York brokerage houses, pp. 75–76, *infra;* and the over-all agreement between the National and New York Boards as to which cases shall be handled by each, pp. 71–75, *infra.*) In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board. Where no such policy is in effect and the National Board accepts or declines jurisdiction on a case-to case basis, assertion of jurisdiction by State Boards must await rejection of jurisdiction by the National Board with respect to a specific petition or charge.[36]

[36] Under new Rules and Regulations adopted by the National Board, pursuant to the requirements of the Administrative Procedure Act (Pub. No. 404, 79th Cong., 2d Sess., § 6 (a)), the Board will make clear whether its refusal to proceed is based on its decision not to apply the National Act to the particular enterprise, thereby permitting the State Board to proceed in the case, or whether its refusal is predicated on other considerations, such as lack of merit, which would bar State action. See National Labor Relations Board, Rules and Regulations, Series 4, effective September 11, 1946, sections 203.15, 203.57, 11 F. R. No. 177-A, pp. 607, 613, providing that reasons shall be briefly stated when the Board dismisses a petition or charge. Even before these Rules and Regulations were adopted it was always possible for the parties or State authorities to ascertain the reasons for the National Board's refusal to proceed by making inquiry to the National Board. See, for example, note 33, p. 62, *supra;* and p. 8, *supra.*

The *Davega* and *Rueping* decisions, which support the State's general concurrent jurisdiction (*supra*, pp. 62–63), seem to be in part at least motivated by the concern of the New York and Wisconsin courts that the establishment of any rule other than one permitting concurrent jurisdiction would "create a twilight zone, in which [an employer] may disobey its plain duty, required by both statutes, upon the pretext that its conduct is dictated by the other statute". See 281 N. Y. at 24, 22 N. E. 2d at 149; 228 Wisc. at 491, 279 N. W. at 679–680. But the rule we suggest—to wit, that where cases are subject to the jurisdiction of the National Board the states may act only when the National Board indicates that it will decline to assume jurisdiction over the particular case or class of cases—eliminates the possibility of such a twilight zone, while at the same time eliminating duplication of function, dispersion of authority, division of responsibility, and the inevitable litigation which would result if the state agencies could exercise a general concurrent jurisdiction.

B. THE UNDERSTANDING WITH THE NEW YORK BOARD

The position of the National Board is shown by the understanding in effect between the National and the New York boards since 1937. On July 12 of that year, after a conference, Chairman Boland of the New York Board outlined the understanding reached in a letter to Chairman

Madden of the National Board. The letter (printed *infra*, pp. 103–105) stated, *inter alia*,

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores,
> 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
> 3. Service trades (such as laundries),
> 4. Office and residential buildings,
> 5. Small and clearly local public utilities, (This includes local traction companies, as well as gas and electric light corporations.)
> 6. Storage warehouses,
> 7. Construction operations,
> 8. Other obviously local businesses.

With respect to "concurrent jurisdiction" the letter stated that "we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing."

The matter was reexamined, in conference between representatives of the two boards, in 1945, as a consequence of the action of the State Board in taking jurisdiction over the petitions of supervisory employees in "large interstate manufac-

turing establishments". A memorandum prepared by General Counsel Alvin J. Rockwell of the National Board (printed in full, *infra*, pp. 92–103), which General Counsel Grady of the State Board considered "a fair statement of the proceedings" (see Mr. Grady's letter, *infra*, p. 91), referred to Chairman Boland's letter of July 12, 1937, and amplified the understanding therein described. With respect to the problem of concurrent jurisdiction it was noted that no memorandum on the subject had been prepared and no subsequent understanding reached. The memorandum then goes on (*infra*, p. 101):

> * * * In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum, above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State

> Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National Board had asserted exclusive jurisdiction over such employers.

The Boards disagreed, however (*infra*, p. 102), as to whether the State Board should

> * * * entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board.
>
> * * * * * * *
>
> * * * no broad understanding was reached on this score, both Boards reserving their respective positions * * *.

As a matter of general policy, however (*infra*, p. 96)—

> * * * The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.

It thus appears that apart from the supervisory employee problem involved in the cases at bar, the two Boards had arrived at an understanding whereby the State Board did not exercise jurisdiction over those industries regulated by the National Board, and the National Board recognized the propriety of state proceedings in local industries which it did not attempt to reach.

The problem arose again in August 1946, when employees of a brokerage house in New York City invoked the jurisdiction of the National Board. The National Board thereupon entered a minute in its record (set forth, *infra*, pp. 105–106), that

> * * * The Board concluded that it would not, at this time, entertain a petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Subsequently when the employer, claiming that it was subject only to the National authority, challenged the jurisdiction of the New York Board, this minute was read into the record of the State Board proceedings by a representative

of the National Board.[37] The State Board, in taking jurisdiction of the case, relied in part upon the expression of the National Board's views.

We think the practical approach to the problem of concurrent jurisdiction by the New York and National Boards points the way to the proper solution of the constitutional problem.

Both Boards seem to have agreed that jurisdiction between them must in general be allotted "on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with)," and that only one board should exercise jurisdiction "over a particular employer." See *supra*, p. 74. Thus the Boards have implicitly recognized that it is unsatisfactory to allow national and state agencies to exercise concurrent jurisdiction over the same employer. The unexpressed reason underlying this conclusion, we surmise, was the need for avoiding the confusion and interference which we have described earlier in this brief, and which the Boards, we believe, agree will impair the operation of the Labor Relations Acts. And the Boards have so divided the field as to leave to the National agency the interstate industries, while leaving some local borderline situations to the State. The

[37] New York State Labor Relations Board, *Matter of Harris, et al.*, Decision No. 3683, August 30, 1946, 18 L. R. R. M. 1384.

result is that interstate industries over which the National Board has consistently taken jurisdiction are not to be touched by the State, but that where the National Board does not exercise its jurisdiction, the State may act.

We believe this disposition of the problem to be most consistent with the policy of the national statute, and with the intention of Congress that that policy be effectuated. We accordingly conclude that the National Act does supersede the application of state laws—whether the same or different—for those industries over which the National Board exercises authority.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgments of the courts below should be reversed.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*

ROBERT L. STERN,
*Special Assistant to the Attorney General.*

GERHARD P. VAN ARKEL,
*General Counsel,*

MORRIS P. GLUSHIEN,
*Associate General Counsel,*

MOZART G. RATNER,
*Attorney,*
*National Labor Relations Board.*

OCTOBER 19[illegible].

## APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competi-

tive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an

employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 4. (a) * * * * * *

The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6. (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute

of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the em-

ployer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive; and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time,

or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

## APPENDIX B

The pertinent provisions of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by the New York Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York §700–716) is as follows:

SEC. 700. FINDINGS AND POLICY.—The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, sub-

stantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby

declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

SEC. 701. DEFINITIONS.

* * * * *

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in

the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

* * * * *

SEC. 703. RIGHTS OF EMPLOYEES.—Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

SEC. 704. UNFAIR LABOR PRACTICES.

* * * * *

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

* * * * *

SEC. 705. REPRESENTATIVES AND ELECTIONS.—1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in

respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between

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individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

* * * * *

SEC. 706. PREVENTION OF UNFAIR LABOR PRACTICES.—1. The Board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

* * * * *

SEC. 715. APPLICATION OF ARTICLE.—The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act * * *.

* * * * *

# APPENDIX C

## Documents Indicating Understanding Between the New York and the National Labor Relations Boards

NEW YORK STATE LABOR RELATIONS BOARD
250 West 57th Street
NEW YORK 19

WILLIAM E. GRADY, JR.
General Counsel

JULY 10, 1945.

ALVIN J. ROCKWELL, Esquire
*General Counsel,*
*National Labor Relations Board,*
*Washington, D. C.*

DEAR MR. ROCKWELL: The Board has examined your memorandum of our conference of April 20, 1945 and considers that it represents a fair statement of the proceedings.

As to insurance companies (page 6 of your memo), you will recall that we mentioned our prior experience with such companies and the fact that units of less than state-wide scope have been established and upheld by the courts. In such cases, therefore, we think it would be to the benefit of both Boards that you clear with us. A situation may very easily arise in which you would prefer to have us entertain a petition which had been filed with us.

Best regards.

Sincerely,

/s/ WILLIAM E. GRADY, JR.



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NATIONAL LABOR RELATIONS BOARD,
*Washington 25, D. C, July 26, 1945.*

WILLIAM E. GRADY, Jr.,
*General Counsel,*
*New York State Labor Relations Board,*
*250 West 57th Street,*
*New York City 19, N. Y.*

DEAR MR. GRADY: In Mr. Rockwell's absence on vacation this week, I am replying to your letter of July 10.

Mr. Rockwell's memorandum of our conference of April 20 and your letter were discussed with and approved by the Members of the Board.

We are, accordingly, circulating copies of this memorandum to the members of our staffs in the Buffalo and New York City offices. This memorandum and your letter will hereafter be followed as a guide in relations between the two Boards as regards cases arising in New York State.

Sincerely yours,

/s/ Oscar S. Smith
OSCAR S. SMITH,
*Director of Field Division.*

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MEMORANDUM RE CONFERENCE BETWEEN REPRESENTATIVES OF NEW YORK STATE LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS BOARD, HELD FRIDAY, APRIL 20, 1945

A conference was held at the offices of the New York State Labor Relations Board on Friday, April 20, 1945, attended by Father Kelley, Chairman, and Board Members Goldberg and Lorenz,

Executive Secretary Goldberg, General Counsel Grady, and Associate General Counsel Feldblum, of the New York State Labor Relations Board, and by Field Director Smith, New York Regional Director Howard LeBaron, General Counsel Rockwell, and New York Regional Attorney Perl, of the National Labor Relations Board. The subject of the conference was the proper division of jurisdiction between the National and State Boards.

This conference followed an earlier conference held on January 9, 1945, in Washington, between Messrs. Smith and Rockwell and Buffalo Regional Director Ryder, representing the NLRB, and Messrs. Goldberg and Feldblum, representing the New York Board. At the conference in Washington, the principal subject discussed was the action of the State Board in entertaining election petitions involving the employees of large interstate manufacturing establishments over which the National Board has customarily asserted jurisdiction. The cases in question related to petitions filed by labor organizations which sought to be certified as representatives of units of supervisory employees or, in one case, a labor organization which sought to represent non-supervisory employees but whose membership was composed of a substantial number of supervisors. At the time of the January conference, the Board's decision in the *Packard* case, 61 N. L. R. B., No. 3, had not been issued; it appeared that in certifying a labor organization for supervisory employees the State Board was taking action contrary to that which would have been taken

by the National Board had the petition been filed with it. It was also believed that the action of the State Board in proceeding to a certification of a labor organization for non-supervisory employees whose membership included supervisors in substantial number might be contrary to the National Board's disposition of the case under its decision in *Matter of Rochester & Pittsburgh Coal Co.*, 56 N. L. R. B. 1760. No understanding was reached with regard to these types of cases at the January conference. In the meantime, on March 26, 1945, the Board issued its decision in the *Packard* case, holding that it would proceed to certify unaffiliated unions as representative of supervisory employees and leaving open the question of whether it would proceed to certify affiliated unions as such representatives. The New York conference was arranged in order to discuss the types of cases which were the subject of the January conference and also to canvass in general the question of the respective jurisdictions of the two Boards.

The New York conference began with consideration of Father Boland's letter to Mr. Madden dated July 12, 1937, which has constituted the principal basis of understanding between the two Boards during the ensuing years. The Boland letter states:

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
>
> 1. Retail stores.

2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,
5. Small and clearly local public utilities, (This includes local traction companies, as well as gas and electric light corporations.)
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

A copy of the letter of July 12, 1937, is attached to this memorandum.

At the time of the preparation of the letter of July 12 and the conference which preceded it and upon which it is based, there was relatively little case law as to the jurisdiction under the commerce clause of the National Board under the National Act. Since that time there has been a large number of decisions in the federal circuit courts of appeals and several in the Supreme Court which have substantially extended the Board's jurisdiction beyond that which was understood to exist in July 1937. To take only one pertinent example: In July 1937 the Board had not asserted jurisdiction over retail establishments. Since 1937 the Board has accepted a considerable number of cases involving retail establishments such as department stores and the Board's power in this respect has been sustained by the courts. Notwithstanding this extension of jurisdiction under the National Act, the National and State Boards, respectively, have, in general,

followed the understanding reflected by the letter of July 12, 1937. Thus, in New York State the National Board has not asserted jurisdiction over retail establishments. The representatives at the conference of April 20 expressed the view that, by and large, the understanding had worked out well as applied to the types of businesses there dealt with. The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.[1]

Following reference to the letter of July 12, there was detailed discussion of the eight categories there listed, which are quoted above. The

[1] In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223, the Supreme Court indicated that in deciding whether or not to assert jurisdiction the National Board could properly take into account the existence of State protective legislation, such as the New York State Labor Relations Act.

The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed. It is believed, nevertheless, that understandings such as that embodied in the letter of July 12, 1937, although of no legal effect, assist both Boards in determining the proper disposition of particular cases as they arise.

gist of this discussion was as follows: *Retail stores.* Where the same company operates retail stores and also does a substantial interstate mail order business from within New York State, representatives of the National Board pointed out that probably the National Act should be applied to the company. The understanding was reached that before the State Board asserted jurisdiction in the future over any such companies, the case would be cleared with the National Board through the New York City or Buffalo offices, depending upon the region in which the case arose. *Service trades.* Where a New York concern is in the business of furnishing guards, window washers, laundry, or some other type of service within the State, it was felt that the business is essentially local in character and should be subject to the State Act even though the services are furnished to a number of large interstate enterprises, which in themselves are subject to the jurisdiction of the National Act. (An exception is the case of detective agencies doing business on a national scale, concerning which, it is understood, the State Board will clear with the National Board before asserting jurisdiction.) On the other hand, where the interstate enterprise, over which the National Board would customarily assert jurisdiction, supplies its own guard, window washing, laundry, or other service for itself, it was believed that the employees involved would rightly come within the jurisdiction of the National Act. The test here is whether the service is performed by a separate business establishment which can properly be considered a local

enterprise, even though services are rendered to interstate businesses, or whether the service is rendered by the interstate enterprise itself as an incident of its own business. *Office buildings.* The same test applicable to the service trades was also thought to be applicable to office buildings. Thus, if the employer involved is in the business of operating office buildings he is subject to the State Act even though tenants consist of interstate enterprises. On the other hand, where the office building is owned or operated, or both, by an interstate enterprise, over which the National Board would customarily assert jurisdiction, and is used by the interstate enterprise in conducting its interstate business, the National Board would expect to assert jurisdiction. *Public utilities.* It was agreed that the New York Board could properly assert jurisdiction over such utilities, including electric, gas, traction, bus companies, and the like which are not themselves engaged in supplying service across the State line. In short, where the National Board could only base its jurisdiction on the "affecting commerce" principle (plus the shipment into the State of fuel and capital equipment, not for resale), it was believed in general that the National Board could properly leave jurisdiction to the State Board. An exception to this working rule is provided by a few very large utilities, such as the Consolidated Edison Company, over which the National Board originally asserted jurisdiction. *Warehouses.* The test applied in the case of service trades and office buildings seems applicable to warehouses, the question being whether they are operated as separate local enterprises or as incidents of the

operation of interstate business over which the National Board would customarily take jurisdiction. *Construction business.* The New York Board is expected to assert jurisdiction over the construction industry except, for example, in the case of the construction of ships, which is thought of as falling within the field of manufacturing, over which, in general, the National Board asserts jurisdiction.

In addition to the foregoing lines of activity, referred to in the letter of July 12, 1937, two other businesses not dealt with in that letter were also discussed. *Insurance companies.* In the past both the State and the National Boards have intermittently asserted jurisdiction over insurance companies. So far as small insurance, bonding, casualty companies, etc., doing business primarily within the State are concerned, it was felt that the State Board should occupy this field. So far as the large national companies are concerned, however, the representatives of the National Board expressed the view that hereafter cases involving such companies should be handled by the latter Board. In this connection it was pointed out that as organization has matured among the large companies, State-wide and even larger units are being established and that this type of activity had therefore advanced to the stage where it was peculiarly the interest of the National Board. It was agreed that the State Board would not entertain any cases involving the large national companies without prior clearance with the National Board. *Newspapers.* The National Board has taken jurisdiction over large daily newspapers in New York and other States

and, where challenged, has been uniformly sustained in this by the courts. At the same time, the circulation departments of such newspapers, to the extent that the distributing activity is confined within a single State, are in many aspects local in character. In New York State, and particularly in New York City, where news vendors are subject to local licensing requirements, the National Board feels that cases involving the distribution of newspapers should properly be handled by the State Board. Consistent with this approach, the New York Regional Office of the National Board has recently referred to the State Board news vendor cases involving four of the largest afternoon newspapers in New York City. The representatives of the State Board expressed agreement with this approach and indicated that the proper line of division might come at the level of the circulation managers. It was agreed that hereafter neither Board will accept cases at the circulation manager level without prior clearance with the other Board; that cases above this level will be handled by the National Board; and that cases below this level will be handled by the State Board. Of course, small newspapers of limited circulation will properly be handled by the State Board.

*Concurrent jurisdiction.*[2] The letter of July 12, 1937, left open the question of "concurrent jurisdiction"—by which, it is understood, was meant the procedure to be followed in the case

[2] See *Davega-City Radio, Inc.* v. *New York Labor Relations Board*; 281 N. Y. 13; 22 N. E. 2nd 145; 4 L. R. R. Man. 899. (July 11, 1939.)

of employers who might simultaneously be subject to the requirements of both the State and National Acts. The letter stated: "So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing." It appears that the memorandum referred to was never prepared and that no subsequent understanding was reached as to such concurrent jurisdiction. In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum, above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National Board had asserted exclusive jurisdiction over such employers.

At the conference of April 20 the representatives of the National Board pointed to the recent decision in the *Packard* case and suggested that

the State Board should adhere to its general policy of leaving all cases involving large manufacturing establishments doing interstate business to the National Board. The impracticability of both Boards intermittently asserting jurisdiction over the same employer was emphasized, and in addition the question was raised whether under the Federal Constitution the State Board could lawfully enforce any requirements against such employers which was inconsistent with or which imposed restraints in addition to those enforced by the National Board. The representatives of the New York Board agreed that cases of this type presented a legal problem but were of the view that it was advisable for the State Board to entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The representatives of the New York Board pointed to their obligation to contribute to the maintenance of industrial peace within the borders of New York State and recalled a provision of the New York Constitution which guarantees organizational rights to all employees. The representatives of the latter Board agreed, however, that their officials should not reach out for cases of this character, involving large interstate manufacturers, and that they would keep the National Board advised as to all such cases they decided to entertain. Thus, no broad understanding was reached on this score, both Boards reserving their respective positions with regard to petitions for units of supervisory employees and other petitions involving large interstate manufacturers.

It was believed that it would be helpful to the work of both Boards if lists of cases entertained within the State were periodically exchanged. The details of this were left to be worked out.

NEW YORK STATE LABOR RELATIONS BOARD,
*July 12, 1937.*

Honorable J. WARREN MADDEN,
*National Labor Relations Board,*
*Washington, D. C.*

DEAR MR. MADDEN: We wish, in the first place, to thank you and your colleagues for your warm reception of last Wednesday. It is gratifying to know that we can look forward to such wholehearted cooperation from your Board and its staff. We will gladly reciprocate.

As requested, we outline our recollection of the understandings reached: So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing.

Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:

1. Retail stores,
2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,

5. Small and clearly local public utilities, (this includes local traction companies, as well as gas and electric light corporations).
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

Clearance is certainly going to be required in the case of industries where the raw materials or most of them come from without the State, but the product is not shipped beyond the borders of New York. (The question here is as to the breadth of application of the "come to rest" doctrine of the *Schechter* case.)

You are familiar, of course, with Section 715 of our statute, part of which reads as follows: "Application of article. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . .". The New York State Board will undoubtedly take the position that the words "agrees with" contemplate the necessity of our Board's agreeing with the employer that his employees are subject to the national statute, and that no employer can by unilateral action select his jurisdiction.

This however, does not solve all of the problems created by the Section, since it is clear that even the agreement of this Board with the employer will not necessarily bestow federal jurisdiction under the Constitution. Presumably every time such a concession is proffered by an employer,

our Board will have to clear with the National Board officials in the same way it would clear with them if no such concession were made.

It is our understanding that we should clear on all questions of jurisdiction with the Regional Directors in New York City and Buffalo in the first instance, and that you will instruct your Directors to reciprocate by clearing with us all doubtful cases which first come to their attention.

Whenever this Board and either of your Regional Directors find themselves unable to agree, the matter will be taken up with you at once.

We would appreciate knowing that your recollection and understanding of the above are in accord with our own.

Very sincerely yours,

John P. Boland

(Dr.) JOHN P. BOLAND, *Chairman.*

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NATIONAL LABOR RELATIONS BOARD

MINUTES OF AUGUST 16, 1946

An informal inquiry was made to the Board by United Financial Employees Association asking whether the Board would entertain a Section 9 representation petition on behalf of the employees of Harris Upham and Company, a New York brokerage house. The Board was also advised that similar petitions were contemplated for the employees of a number of similar New York brokerage houses. The Board concluded that it would not, at this time, entertain a

petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Dated at Washington, D. C.
August 16, 1946.

Donn N. Bent
DONN N. BENT,
*Executive Secretary.*

Approved:
s/ P. M. H.
s/ J. M. H.

Certified to be a true and correct copy.

s/ Donn N. Bent,
DONN N. BENT,
*Executive Secretary.*

U. S. GOVERNMENT PRINTING OFFICE: 1946

Frankfurter o. 7

# SUPREME COURT OF THE UNITED STATES

Nos. 55 and 76.—October Term, 1946.

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| Bethlehem Steel Company, et al., Appellants, v. New York State Labor Relations Board. | Appeal from the Court of Appeals of the State of New York. |
| The Allegheny Ludlum Steel Corp., Appellant, v. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York. | Appeal from the Supreme Court of the State of New York for the County of Chautauqua. |

55

76

[April 7, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

These appeals challenge the validity of the Labor Relations Act of the State of New York as applied to appellants to permit unionization of their foremen. Conflict is asserted between it and the National Labor Relations Act and hence with the Commerce Clause of the Constitution.

After enactment by Congress of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*, New York adopted a State Labor Relations Act following the federal pattern. Laws of New York, 1937, Chap. 443, 30 McKinney's Consolidated Laws of New York, §§ 700–716. In the administrative boards they create, the procedures they establish, the unfair labor practices prohibited, the two statutes may be taken for present purposes to be the same. But in provision for determination of units of representation for bargaining purposes, the

two Acts are not identical. Their differences may be made plain by setting forth § 9 (b) of the Federal Act, with that part which is omitted from the State Act in brackets and additions made by the State Act as amended, Laws of New York, 1942, Chap. 518, in italics:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization [and] to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, *multiple employer unit*, craft unit, plant unit, or [subdivision thereof] *any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.*"

The procedures prescribed for the two boards for investigation, certification, and hearing on representation units and for their election are substantially the same except that the State law adds the following limitation not found in the Federal Act: ". . . provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization." Laws of New York, 1937, Chap. 433, as amended, Laws 1942, Chap. 518, 30 McKinney's Consolidated Laws of New York, § 705.3.

The two boards have at times pursued inconsistent policies in applying their respective Acts to petitions of foremen as a class to organize bargaining units thereunder. The State Board has in these cases recognized that right; the National Board for a time recognized it. *Union Collieries Coal Co.*, 41 N. L. R. B. 961; *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Later, there was a period

when, for policy reasons but without renouncing jurisdiction, it refused to approve foremen organization units. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *General Motors Corp.*, 51 N. L. R. B. 457. Now, again, it supports their right to unionize. *Packard Motor Car Co.*, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298. The foremen of these appellants, at a time when their desire to organize was frustrated by the policy of the National Board, filed applications with the State Board. It entertained their petitions and its policy permitted them as a class to become a bargaining unit. Both employers, by different methods adequate under State law to raise the question, challenged the constitutionality of the State Act as so applied to them. Their contentions ultimately were considered and rejected by the New York Court of Appeals and its decisions sustaining state power over the matter were brought here by appeals.

Both of these labor controversies arose in manufacturing plants located in New York where the companies employ large staffs of foremen to supervise a much larger force of labor. But both concerns have such a relation to interstate commerce that, for the reasons stated in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, federal power reaches their labor relations. On this basis the National Board has exercised power to certify bargaining agents for units of employees other than foremen of both companies. Matter of *Allegheny Ludlum Steel Corporation and Steel Workers Organizing Committee*, Case No. III–R–411, N. L. R. B., June 29, 1942; Matter of *Bethlehem Steel Corp.* and *C. I. O.*, 30 N. L. R. B. 1006, 32 N. L. R. B. 264; 1941 (production and maintenance employees); Matter of *Bethlehem Steel Corp.* and *A. F. of L.*, 47 N. L. R. B. 1330, 1943 (plant protection employees); Matter of *Bethlehem*

*Steel Corporation* and *C. I. O.*, 52 N. L. R. B. 1217, 1943 (employees in order department); Matter of *Bethlehem Steel Co.* and *A. F. of L.*, 55 N. L. R. B. 658, 1944 (fire department employees). The companies contend that the National Board's jurisdiction over their labor relations is exclusive of state power; the State contends on the contrary that while federal power over the subject is paramount, it is not exclusive and in such a case as we have here, until the federal power is actually exercised as to the particular employees, State power may be exercised.

At the time the courts of the State of New York were considering this issue, the question whether the Federal Act would authorize or permit unionization of foremen was in controversy and was unsettled until our decision in *Packard Motor Car Co.* v. *N. L. R. B.*, — U. S. —. Whatever constitutional issue may have been presented by earlier phases of the evolution of the federal policy in relation to that of the State, the question now is whether, Congress having undertaken to deal with the relationship between these companies and their foremen, the State is prevented from doing so. Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action. *Cf.* Securities Act of 1933, § 18, 48 Stat. 85, 15 U. S. C. § 77r; Securities Exchange Act of 1934, § 28, 48 Stat. 903, 15 U. S. C. § 78bb; United States Warehouse Act, § 29, before and after 1931 amendment, 39 Stat. 490, 46 Stat. 1465, 7 U. S. C. § 269. Our question is primarily one of the construction to be put on the Federal Act. It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

In determining whether exclusion of state power will or will not be implied, we well may consider the respective relation of federal and state power to the general subject matter as illustrated by the case in hand. These companies are authorized to do business in New York State, they operate large manufacturing plants in that state, they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so "intimately blended and intertwined with responsibilities of the national government" that its nature alone raises an inference of exclusion. *Cf. Hines* v. *Davidowitz*, 312 U. S. 52, 66.

Indeed, the subject matter is one reachable, and one which Congress has reached, under the federal commerce power, not because it is interstate commerce but because under the doctrine given classic expression in the *Shreveport* case, Congress can reach admittedly local and intrastate activities "having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 351. See also *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee

relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. Such was the situation in *Allen-Bradley Local* v. *Board*, 315 U. S. 740, where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state. However, the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida*, 325 U. S. 538, 542. *Cf. Maurer* v. *Hamilton*, 309 U. S. 598. When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own. *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87. In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. *Northwestern Bell Telephone Co.* v. *Nebraska State Commission*, 297, U. S. 471; *Welch Co.* v. *New Hampshire*, 306 U. S. 79. But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605. How-

ever, when federal administrative regulation has been slight under a statute which potentially allows minute and multidudinous regulation of its subject, *cf. Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co.* v. *Nebraska State Commission, supra; Welch Co.* v. *New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1. However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; compare *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, with *Parker* v. *Brown*, 317 U. S. 341; *cf. Mintz* v. *Baldwin*, 289 U. S. 346.

It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class. There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. *Soss Manufacturing Co.*, 56 N. L. R. B. 348. It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bar-

gaining purposes. *Maryland Drydock Co.*, 49 N. L. R. B. 733. We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.

Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. *Cf. Matter of Creamery Package Mfg. Co.*, 34 N. L. R. B. 108; Wisc. Emp. Rel. Bd. Case III, No. 348 E–117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . ." *Charleston R. Co. v. Varnville Co.*, 237 U. S. 597, 604. See also *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 448; *Missouri Pacific R. R.* v. *Porter*, 273 U. S. 341, 345–6. If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think

that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their negotiations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in this case, since the National Board made no concession or delegation of power to deal with this subject. The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide.

We therefore conclude that it is beyond the power of New York State to apply its policy to these appellants as attempted herein. The judgments appealed from are reversed and the causes remanded for further proceedings not inconsistent herewith.

*Reversed.*

# SUPREME COURT OF THE UNITED STATES

Nos. 55 AND 76.—OCTOBER TERM, 1946.

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| Bethlehem Steel Company, et al., Appellants, v. New York State Labor Relations Board. | Appeal from the Court of Appeals of the State of New York. |
| The Allegheny Ludlum Steel Corp., Appellant, v. William J. Kelley and H. Myron Lewis, Constituting the State Labor Relations Board of the State of New York. | Appeal from the Supreme Court of the State of New York for the County of Chautauqua. |

[April 7, 1947.]

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join.

The legal issue in these cases derives from our decision in *Packard Motor Car Co. v. National Labor Relations Board*, No. 658, this Term, decided March 10, 1947. The Court there held that foremen are "employees" within § 2 (3) of the National Labor Relations Act, 49 Stat. 449, 450, and as such are entitled to the rights of self-organization under the Act. As the *Packard* case points out, the exercise of this authority over foremen has had a chequered history before the National Labor Relations Board. There was a period when the Board in the exercise of its discretion denied resort to its authority by foremen seeking collective bargaining representation. During that period, foremen of the two petitioning steel companies invoked the jurisdiction of the New York State Labor Board to certify

them as a bargaining unit under the New York law descriptively characterized as a "Little Wagner Act" because it enforces the same policies by the same means as does the Wagner Act. The State Board assumed jurisdiction and the New York Court of Appeals sustained that assumption. Our problem is whether the National Labor Relations Act in its entirety—the law as Congress gave it to the National Board for administration—precluded this exercise of State authority.

If the Court merely held that, having given the National Board jurisdiction over foremen Congress also gave it discretion to determine that it may be undesirable, as a matter of industrial relations, to compel recognition of foremen's unions; that the Board had so exercised its discretion and, by refusing to sanction foremen's unions, had determined that foremen in enterprises like those before us could not exact union recognition; that therefore New York could not oppose such federal action by a contrary policy of its own, I should concur in the Court's decision, whatever the differences of interpretation to which the course of events before the National Board may lend itself. But the Court's opinion does not, as I read it, have that restricted scope, based on the individual circumstances before us. Apart from the suggestion that the National Board's declination of jurisdiction "in certain types of cases, for budgetary reasons" might leave room for the State in those situations, the Court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining in all industries within its borders as to which Congress has granted opportunity to invoke the authority of the National Board.

The inability of the National Board to exercise its dormant powers because of lack of funds ought not to furnish a more persuasive reason for finding that concurrent State power may function than a deliberate exercise of

judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards. This states abstractly a very practical situation. Based on the realization that as a practical matter the National Board could not effectuate the policies of the Act committed to it over the whole range of its authority, an arrangement was worked out whereby the National Board leaves to the State Board jurisdiction over so-called local industries covered by the federal Act, while the State Board does not entertain matters over which the National Board has consistently taken jurisdiction. This practical Federal-State working arrangement, arrived at by those carrying the responsibility for breathing life into the bare bones of legislation, is so relevant to the solution of the legal issues arising out of State-Nation industrial interaction, that I have set forth the agreement in full into Appendix. Particularly when dealing with legal aspects of industrial relations is it important for courts not to isolate legal issues from their workaday context. I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations.

Since we are dealing with aspects of commerce between the States that are not legally outside State action by virtue of the Commerce Clause itself, New York

has authority to act so long as Congress has not interdicted her action. While what the State does she does on sufferance, in ascertaining whether Congress has allowed State action we are not to consider the matter as though Congress were conferring a mere bounty, the extent of which must be viewed with a thrifty eye. When construing federal legislation that deals with matters that also lie within the authority, because within the proper interests, of the States, we must be mindful that we are part of the delicate process of adjusting the interacting areas of National and State authority over commerce. The inevitable extension of federal authority over economic enterprise has absorbed the authority that was previously left to the States. But in legislating, Congress is not indulging in doctrinaire, hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

This is an old problem and the considerations involved in its solution are commonplace. But results not always harmonious have from time to time been drawn from the same precepts. In law also the emphasis makes the song. It may make a decisive difference what view judges have of the place of the States in our national life when they

come to apply the governing principle that for an Act of Congress completely to displace a State law "the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243. Congress can speak so unequivocally as to leave no doubt. But real controversies arise only when Congress has left the matter in doubt, and then the result depends on whether we require that actual conflict between State and federal action be shown, or whether argumentative conflict suffices.

Our general problem was only recently canvassed in the three opinions in *Hill* v. *Florida*, 325 U. S. 538. But the frequent recurrence of the problem and the respective legislative and judicial share in its proper solution justify some repetition. It may be helpful to recall the circumspection with which federal absorption of authority previously belonging to the States was observed in the control of railroad rates.

In the *Minnesota Rate Cases*, 230 U. S. 352, this Court, after elaborate argument and extended consideration, held that State rates covering intrastate transportation could not be stricken down judicially even though it may be shown that such rates adversely affect carriers in their interstate aspects. This decision was based largely on the respect to be accorded to the respective functions of State and national authority, as evinced by Congressional and judicial history. But a year later, the Court held that when the Interstate Commerce Commission found that State regulation of local rates was designed to operate discriminatorily against related interstate commerce, the Interstate Commerce Act authorized removal of the discrimination against the interstate rates. *Houston, East and West R. Co.* v. *United States*, 234 U. S. 342. Nevertheless, so important did this Court deem respect for State power that it would not allow the *Shreveport* doctrine to

be loosely used as a curtailment of State authority. Accordingly, it insisted on precision and definiteness in the orders of the Interstate Commerce Commission in this interacting area. *Illinois Central R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493. Subsequently, by the Transportation Act of 1920, Congress formalized the *Shreveport* doctrine and extended its scope. The Commission was expressly authorized to correct State rates that were unreasonable with reference to related interstate rates, and was also given control over State rates which adversely affected interstate commerce as such. See § 13, par. 4 of the Interstate Commerce Act, as amended by §§ 416 and 422 of the Transportation Act of 1920, 41 Stat. 456, 484, 488; *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. It is not without significance that in exercising this new power Congress associated with the Interstate Commerce Commission the appropriate State agencies in an advisory capacity. Even where foreign commerce is involved, as to which State control is naturally viewed with less favor, this Court has not ruled out State authority derived from a State interest where State regulation was found to be complementary to federal regulation. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 208–09.

No doubt, as indicated, cases have not always dealt with such scrupulous regard for State action where Congress has not patently terminated it. Metaphor—"occupied the field"—has at times done service for close analysis. But the rules of accommodation that have been most consistently professed as well as the dominant current of decisions make for and not against the *modus vivendi* achieved by the two agencies in the labor relations field, which the Government, as *amicus curiae*, here sponsored. Such an arrangement assures the effectuation of the policies which underlie both the National Labor Relations Act and the "Little Wagner Act" of New York in a manner agreed

upon by the two Boards for dealing with matters affecting interests of common concern. "Where the Government has provided for collaboration the Court should not find conflict." *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.

What is before us is a very real and practical situation. The vast range of jurisdiction which the National Labor Relations Act has conferred upon the Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, untold small enterprises are subject to the power of the Board. While labor difficulties in these units in the aggregate may unquestionably have serious repercussions upon interstate commerce, in their individualized aspects they are equally the concern of their respective localities. Accordingly, the National Labor Relations Board, instead of viewing the attempt of State agencies to enforce the principles of collective bargaining as an encroachment upon national authority, regards the aid of the State agencies as an effective means of accomplishing a common end. Of course, as Mr. Justice Holmes said, "When Congress has taken a particular subject matter in hand coincidence is as ineffective as opposition" to save the State law. But this is so only when the State seeks "to enforce a state policy differently conceived. . . ." *Charleston & Western Carolina R. R. Co.* v. *Varnville Furniture Company*, 237 U. S. 597, 604.

The National Board's business explains the reason and supports the reasonableness behind its desire to share burdens that may be the State's concern no less than the Nation's. The Board's Annual Reports show increasing arrears. At the end of the fiscal year 1944, 2602 cases were pending; at the end of 1945, 3244; at the end of 1946, there were 4605 unfinished cases. A shrewd critic has thus expressed the considerations that in the past have often

lain below the surface of merely doctrinal applications: "Formally, the enterprise is one of interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing." T. R. Powell, *Commerce Clause* and *State Police Power*, 12 Minn. L. Rev. 607. In the submission by the Board before us, we have the most authoritative manifestation by national authority that State collaboration would be a blessing rather than a bane, and yet judicial construction would forbid the aid which the agency of Congress seeks in carrying out its duty. It is surely a responsible inference that the result will be to leave uncontrolled large areas of industrial conflict. Neither what Congress has said in the National Labor Relations Act, nor the structure of the Act, nor its policy, nor its actual operation, should be found to prohibit the Board from exercising its discretion so as to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests.

## APPENDIX.

Documents Indicating Understanding Between the New York and the National Labor Relations Boards.

NEW YORK STATE LABOR RELATIONS BOARD
250 West 57th Street
NEW YORK 19

WILLIAM E. GRADY, Jr.
General Counsel

JULY 10, 1945.

ALVIN J. ROCKWELL, Esquire
*General Counsel,*
*National Labor Relations Board,*
*Washington, D. C.*

DEAR MR. ROCKWELL: The Board has examined your memorandum of our conference of April 20, 1945 and considers that it represents a fair statement of the proceedings.

As to insurance companies (page 6 of your memo), you will recall that we mentioned our prior experience with such companies and the fact that units of less than statewide scope have been established and upheld by the courts. In such cases, therefore, we think it would be to the benefit of both Boards that you clear with us. A situation may very easily arise in which you would prefer to have us entertain a petition which had been filed with us.

Best regards.
Sincerely,

s/ WILLIAM E. GRADY, Jr.

NATIONAL LABOR RELATIONS BOARD,
*Washington 25, D. C., July 26, 1945.*

WILLIAM E. GRADY, Jr.,
*General Counsel,*
*New York State Labor Relations Board,*
*250 West 57th Street,*
*New York City 19, N. Y.*

DEAR MR. GRADY: In Mr. Rockwell's absence on vacation this week, I am replying to your letter of July 10.

Mr. Rockwell's memorandum of our conference of April 20 and your letter were discussed with and approved by the Members of the Board.

We are, accordingly, circulating copies of this memorandum to the members of our staffs in the Buffalo and New York City offices. This memorandum and your letter will hereafter be followed as a guide in relations between the two Boards as regards cases arising in New York State.

Sincerely yours,

s/ Oscar S. Smith
OSCAR S. SMITH,
*Director of Field Division.*

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MEMORANDUM RE CONFERENCE BETWEEN REPRESENTATIVES OF NEW YORK STATE LABOR RELATIONS BOARD AND NATIONAL LABOR RELATIONS BOARD, HELD FRIDAY, APRIL 20, 1945.

A conference was held at the offices of the New York State Labor Relations Board on Friday, April 20, 1945, attended by Father Kelley, Chairman, and Board Members Goldberg and Lorenz, Executive Secretary Goldberg, General Counsel Grady, and Associate General Counsel Feldblum, of the New York State Labor Relations Board, and by Field Director Smith, New York Regional Director

Howard LeBaron, General Counsel Rockwell, and New York Regional Attorney Perl, of the National Labor Relations Board. The subject of the conference was the proper division of jurisdiction between the National and State Boards.

This conference followed an earlier conference held on January 9, 1945, in Washington, between Messrs. Smith and Rockwell and Buffalo Regional Director Ryder, representing the NLRB, and Messrs. Goldberg and Feldblum, representing the New York Board. At the conference in Washington, the principal subject discussed was the action of the State Board in entertaining election petitions involving the employees of large interstate manufacturing establishments over which the National Board has customarily asserted jurisdiction. The cases in question related to petitions filed by labor organizations which sought to be certified as representatives of units of supervisory employees or, in one case, a labor organization which sought to represent non-supervisory employees but whose membership was composed of a substantial number of supervisors. At the time of the January conference, the Board's decision in the *Packard* case, 61 N. L. R. B., No. 3, had not been issued; it appeared that in certifying a labor organization for supervisory employees the State Board was taking action contrary to that which would have been taken by the National Board had the petition been filed with it. It was also believed that the action of the State Board in proceeding to a certification of a labor organization for non-supervisory employees whose membership included supervisors in substantial number might be contrary to the National Board's disposition of the case under its decision in *Matter of Rochester & Pittsburgh Coal Co.*, 56 N. L. R. B. 1760. No understanding was reached with regard to these types of cases at the January conference. In the meantime, on March 26, 1945, the Board issued its decision in the *Packard* case,

holding that it would proceed to certify unaffiliated unions as representative of supervisory employees and leaving open the question of whether it would proceed to certify affiliated unions as such representatives. The New York conference was arranged in order to discuss the types of cases which were the subject of the January conference and also to canvass in general the question of the respective jurisdictions of the two Boards.

The New York conference began with consideration of Father Boland's letter to Mr. Madden dated July 12, 1937, which has constituted the principal basis of understanding between the two Boards during the ensuing years. The Boland letter states:

> Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:
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> 1. Retail stores,
> 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
> 3. Service trades (such as laundries),
> 4. Office and residential buildings,
> 5. Small and clearly local public utilities (this includes local traction companies, as well as gas and electric light corporations),
> 6. Storage warehouses,
> 7. Construction operations,
> 8. Other obviously local businesses.

A copy of the letter of July 12, 1937, is attached to this memorandum.

At the time of the preparation of the letter of July 12 and the conference which preceded it and upon which it is based, there was relatively little case law as to the

jurisdiction under the commerce clause of the National Board under the National Act. Since that time there has been a large number of decisions in the federal circuit courts of appeals and several in the Supreme Court which have substantially extended the Board's jurisdiction beyond that which was understood to exist in July 1937. To take only one pertinent example: In July 1937 the Board had not asserted jurisdiction over retail establishments. Since 1937 the Board has accepted a considerable number of cases involving retail establishments such as department stores and the Board's power in this respect has been sustained by the courts. Notwithstanding this extension of jurisdiction under the National Act, the National and State Boards, respectively, have, in general, followed the understanding reflected by the letter of July 12, 1937. Thus, in New York State the National Board has not asserted jurisdiction over retail establishments. The representatives at the conference of April 20 expressed the view that, by and large, the understanding had worked out well as applied to the types of businesses there dealt with. The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction between the two Boards must be allotted on the basis of the type of industry or business involved (rather, for example, than on the basis of which Board a petition or charge is initially filed with), and that when one Board, pursuant to common understanding, has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matters coming to it to the Board which had entertained the earlier case or cases.[1]

Following reference to the letter of July 12, there was detailed discussion of the eight categories there listed, which are quoted above. The gist of this discussion was

[1] In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 223, the Supreme Court indicated that in deciding whether or not to assert jurisdiction the National Board could properly take into account

as follows: *Retail stores.* Where the same company operates retail stores and also does a substantial interstate mail order business from within New York State, representatives of the National Board pointed out that probably the National Act should be applied to the company. The understanding was reached that before the State Board asserted jurisdiction in the future over any such companies, the case would be cleared with the National Board through the New York City or Buffalo offices, depending upon the region in which the case arose. *Service trades.* Where a New York concern is in the business of furnishing guards, window washers, laundry, or some other type of service within the State, it was felt that the business is essentially local in character and should be subject to the State Act even though the services are furnished to a number of large interstate enterprises, which in themselves are subject to the jurisdiction of the National Act. (An exception is the case of detective agencies doing business on a national scale, concerning which, it is understood, the State Board will clear with the National Board before asserting jurisdiction.) On the other hand, where the interstate enterprise, over which the National Board would customarily assert jurisdiction, supplies its own guard, window washing, laundry, or other service for itself, it was believed that the employees involved would rightly come within the jurisdiction of the National Act. The test here is whether the service is performed by a separate business establishment which can properly be considered a local enterprise even

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the existence of State protective legislation, such as the New York State Labor Relations Act.

The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed. It is believed, nevertheless, that understandings such as that embodied in the letter of July 12, 1937, although of no legal effect, assist both Boards in determining the proper disposition of particular cases as they arise.

though services are rendered to interstate businesses, or whether the service is rendered by the interstate enterprise itself as an incident of its own business. *Office buildings.* The same test applicable to the service trades was also thought to be applicable to office buildings. Thus, if the employer involved is in the business of operating office buildings he is subject to the State Act even though tenants consist of interstate enterprises. On the other hand, where the office building is owned or operated, or both, by an interstate enterprise, over which the National Board would customarily assert jurisdiction, and is used by the interstate enterprise in conducting its interstate business, the National Board would expect to assert jurisdiction. *Public utilities.* It was agreed that the New York Board could properly assert jurisdiction over such utilities, including electric, gas, traction, bus companies, and the like which are not themselves engaged in supplying service across the State line. In short, where the National Board could only base its jurisdiction on the "affecting commerce" principle (plus the shipment into the State of fuel and capital equipment, not for resale), it was believed in general that the National Board could properly leave jurisdiction to the State Board. An exception to this working rule is provided by a few very large utilities, such as the Consolidated Edison Company, over which the National Board originally asserted jurisdiction. *Warehouses.* The test applied in the case of service trades and office buildings seems applicable to warehouses, the question being whether they are operated as separate local enterprises or as incidents of the operation of interstate business over which the National Board would customarily take jurisdiction. *Construction business.* The New York Board is expected to assert jurisdiction over the construction industry except, for example, in the case of the construction of ships, which is thought of as falling within the field of manufacturing, over which, in general, the National Board asserts jurisdiction.

In addition to the foregoing lines of activity, referred to in the letter of July 12, 1937, two other businesses not dealt with in that letter were also discussed. *Insurance companies.* In the past both the State and the National Boards have intermittently asserted jurisdiction over insurance companies. So far as small insurance, bonding, casualty companies, etc., doing business primarily within the State are concerned, it was felt that the State Board should occupy this field. So far as the large national companies are concerned, however, the representatives of the National Board expressed the view that hereafter cases involving such companies should be handled by the latter Board. In this connection it was pointed out that as organization has matured among the large companies, State-wide and even larger units are being established and that this type of activity had therefore advanced to the stage where it was peculiarly the interest of the National Board. It was agreed that the State Board would not entertain any cases involving the large national companies without prior clearance with the National Board. *Newspapers.* The National Board has taken jurisdiction over large daily newspapers in New York and other States and, where challenged, has been uniformly sustained in this by the courts. At the same time, the circulation departments of such newspapers, to the extent that the distributing activity is confined within a single State, are in many aspects local in character. In New York State, and particularly in New York City, where news vendors are subject to local licensing requirements, the National Board feels that cases involving the distribution of newspapers should properly be handled by the State Board. Consistent with this approach, the New York Regional Office of the National Board has recently referred to the State Board news vendor cases involving four of the largest afternoon newspapers in New York City. The representatives of the State Board expressed agreement with this approach and indicated that the proper line of division might come at the level of the circulation managers.

It was agreed that hereafter neither Board will accept cases at the circulation manager level without prior clearance with the other Board; that cases above this level will be handled by the National Board; and that cases below this level will be handled by the State Board. Of course, small newspapers of limited circulation will properly be handled by the State Board.

*Concurrent jurisdiction.*[2] The letter of July 12, 1937, left open the question of "concurrent jurisdiction"—by which, it is understood, was meant the procedure to be followed in the case of employers who might simultaneously be subject to the requirements of both the State and National Acts. The letter stated: "So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing." It appears that the memorandum referred to was never prepared and that no subsequent understanding was reached as to such concurrent jurisdiction. In practice, this does not seem to have been a problem, except in the situation discussed below, since the State Board has by and large confined its activities to the businesses detailed in the letter of July 12 and the National Board in turn has left this field open to the State Board. The problem of so-called "concurrent jurisdiction" has arisen in recent months because, following the National Board's decision in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, a number of labor organizations have filed election petitions with the State Board which they knew would not be entertained by the National Board. (See the second paragraph of this memorandum above, concerning the conference of January 9, 1945, in Washington.) Prior to the *Maryland Drydock* case, the State Board, it is understood, had refrained from entertaining cases involving large interstate manufacturers and the National

[2] See *Davega-City Radio, Inc.* v. *New York Labor Relations Board*, 281 N. Y. 13; 22 N. E. 2d 145; 4 L. R. R. Man. 899. (July 11, 1939.)

Board had asserted exclusive jurisdiction over such employers.

At the conference of April 20 the representatives of the National Board pointed to the recent decision in the *Packard* case and suggested that the State Board should adhere to its general policy of leaving all cases involving large manufacturing establishments doing interstate business to the National Board. The impracticability of both Boards intermittently asserting jurisdiction over the same employer was emphasized, and in addition the question was raised whether under the Federal Constitution the State Board could lawfully enforce any requirement against such employers which was inconsistent with or which imposed restraints in addition to those enforced by the National Board. The representatives of the New York Board agreed that cases of this type presented a legal problem but were of the view that it was advisable for the State Board to entertain election petitions for units of supervisory employees where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The representatives of the New York Board pointed to their obligation to contribute to the maintenance of industrial peace within the borders of New York State and recalled a provision of the New York Constitution which guarantees organizational rights to all employees. The representatives of the latter Board agreed however, that their officials should not reach out for cases of this character, involving large interstate manufacturers, and that they would keep the National Board advised as to all such cases they decided to entertain. Thus, no broad understanding was reached on this score, both Boards reserving their respective positions with regard to petitions for units of supervisory employees and other petitions involving large interstate manufacturers.

It was believed that it would be helpful to the work of both Boards if lists of cases entertained within the

State were periodically exchanged. The details of this were left to be worked out.

NEW YORK STATE LABOR RELATIONS BOARD,
*July 12, 1937.*

Honorable J. WARREN MADDEN,
*National Labor Relations Board,*
*Washington, D. C.*

DEAR MR. MADDEN: We wish, in the first place, to thank you and your colleagues for your warm reception of last Wednesday. It is gratifying to know that we can look forward to such wholehearted cooperation from your Board and its staff. We will gladly reciprocate.

As requested, we outline our recollection of the understandings reached. So far as concurrent jurisdiction is concerned, we assume that even a tentative understanding must await mutual study of the memorandum which Mr. Fahy is now preparing.

Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials:

1. Retail stores,
2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State,
3. Service trades (such as laundries),
4. Office and residential buildings,
5. Small and clearly local public utilities (this includes local traction companies, as well as gas and electric light corporations),
6. Storage warehouses,
7. Construction operations,
8. Other obviously local businesses.

Clearance is certainly going to be required in the case of industries where the raw materials or most of them come from without the State, but the product is not shipped beyond the borders of New York. (The question here is as to the breadth of application of the "come to rest" doctrine of the *Schechter* case.)

You are familiar, of course, with Section 715 of our statute, part of which reads as follows: "Application of article. The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . .". The New York State Board will undoubtedly take the position that the words "agrees with" contemplate the necessity of our Board's agreeing with the employer that his employees are subject to the national statute and that no employer can by unilateral action select his jurisdiction.

This however, does not solve all of the problems created by the Section, since it is clear that even the agreement of this Board with the employer will not necessarily bestow federal jurisdiction under the Constitution. Presumably every time such a concession is proffered by an employer, our Board will have to clear with the National Board officials in the same way it would clear with them if no such concession were made.

It is our understanding that we should clear on all questions of jurisdiction with the Regional Directors in New York City and Buffalo in the first instance, and that you will instruct your Directors to reciprocate by clearing with us all doubtful cases which first come to their attention.

Whenever this Board and either of your Regional Directors find themselves unable to agree, the matter will be taken up with you at once.

We would appreciate knowing that your recollection and understanding of the above are in accord with our own.

Very sincerely your,

s/ John P. Boland

(Dr.) JOHN P. BOLAND, *Chairman.*

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NATIONAL LABOR RELATIONS BOARD.

MINUTES OF AUGUST 16, 1946.

An informal inquiry was made to the Board by United Financial Employees Association asking whether the Board would entertain a Section 9 representation petition on behalf of the employees of Harris Upham and Company, a New York brokerage house. The Board was also advised that similar petitions were contemplated for the employees of a number of similar New York brokerage houses. The Board concluded that it would not, at this time, entertain a petition filed on behalf of the employees of Harris Upham and Company or other such brokerage houses because of budgetary and other administrative considerations. The Board further concluded that, in view of this disposition, it had no objection to having the State Labor Relations Board of the State of New York entertain such petitions filed under the State Act.

Dated at Washington, D. C.
August 16, 1946.

Donn N. Bent
DONN N. BENT,
*Executive Secretary.*

Approved:
s/ P. M. H.
s/ J. M. H.

Certified to be a true and correct copy.

s/ Donn N. Bent
DONN N. BENT,
*Executive Secretary.*